

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

3 BOOK PEOPLE, INC., ET AL) Docket No. A 23-CA-858 ADA
4)
4 vs.) Austin, Texas
5)
5 MARTHA WONG, IN HER)
6 OFFICIAL CAPACITY AS THE)
6 CHAIR OF THE TEXAS STATE)
7 LIBRARY AND ARCHIVES)
7 COMMISSION, ET AL) August 18, 2023

8 TRANSCRIPT OF MOTION HEARING
9 BEFORE THE HONORABLE ALAN D. ALBRIGHT

10 APPEARANCES:

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12 Mr. W. Reid Pillifant
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24
25 Proceedings reported by computerized stenography,
transcript produced by computer-aided transcription.

08:59:49 1 THE COURT: Would you call the case, please?

08:59:51 2 THE CLERK: Court calls: A-23-CV-858, BookPeople
08:59:55 3 Inc., Et Al vs. Martha Wong, Et Al, for preliminary
08:59:58 4 injunction hearing and motion hearing.

08:59:59 5 THE COURT: Could I have announcements from the
09:00:01 6 counsel, please?

09:00:04 7 MS. PRATHER: Your Honor, Laura Prather,
09:00:07 8 Catherine Robb, Michael Lambert and Reid Pillifant here on
09:00:10 9 behalf of the plaintiffs.

09:00:10 10 THE COURT: Good morning.

09:00:12 11 MS. PRATHER: Good morning.

09:00:15 12 MS. CELLA: Good morning, your Honor.
09:00:17 13 Christina Cella and Amy Pletscher for the
09:00:19 14 defendants.

09:00:19 15 THE COURT: Good morning.

09:00:20 16 So it seems to me, we have a couple of things to
09:00:23 17 take up in no particular order, but they're all important.
09:00:29 18 One of which is, I'd like to hear from both sides how
09:00:33 19 important it is that this issue get resolved by September
09:00:38 20 2nd in that, as I understand it, the state has said
09:00:45 21 they're not going to start enforcing immediately on the
09:00:49 22 2nd -- that's right. There won't be enforcement until
09:00:50 23 like April?

09:00:52 24 MS. CELLA: Your Honor, the lists are not due
09:00:54 25 from vendors until April 1st, 2024. So that's -- our

09:00:57 1 position is nothing would happen until that date.

09:00:59 2 THE COURT: So I'd like to -- and I'm not

09:01:00 3 planning to wait until -- I'm not thinking April. I'm

09:01:06 4 trying to figure out, number one, for y'all's purposes in

09:01:08 5 term of our planning on what we have to get done how hard

09:01:11 6 and fast September 2nd is to get the injunction done

09:01:15 7 because we got motions to dismiss yesterday from the

09:01:22 8 defendants. I'd like -- and we'll get more of that in a

09:01:25 9 second but how -- I'm assuming the plaintiffs aren't ready

09:01:31 10 to respond to this fully today. Is that fair?

09:01:35 11 MS. PRATHER: Yes, your Honor.

09:01:36 12 We have not -- I mean, we got it 36 hours before

09:01:37 13 the hearing. But we do believe that a ruling needs to be

09:01:40 14 entered by the Court on the preliminary injunction before

09:01:43 15 September 1st. The law does go into effect on September

09:01:47 16 1st. The AG can't bind the state not to prosecute.

09:01:53 17 That's not valid. And when we look at the plain language

09:01:56 18 of the bill, it specifically talks about the fact that

09:02:00 19 vendors can no longer sell books to libraries until they

09:02:06 20 are rated and that is not --

09:02:13 21 THE COURT: So -- well, that's helpful. So then,

09:02:15 22 here's what we're going to have to do. I'm going to try

09:02:19 23 and get as much done as I can today given that those were

09:02:24 24 filed yesterday. I'd like to have the plaintiffs respond

09:02:29 25 to the plaintiff -- to the defendants' motions to dismiss

1 by the close of business next Thursday and then, a week
2 from Monday, we'll probably need a second hearing. And
3 so, we'll be getting back together a week from Monday to
4 take up the things that we may not be able to do today.
5 And then, I'm going to try and figure out what all we can
6 accomplish today, given that those motions are pending,
7 but we may not be able to fully resolve them.

8 Then I know that the plaintiffs are here and
9 they're seeking injunctive relief, but it seems to me that
10 I think if I let the plaintiff go first and hear about the
11 preliminary injunctive relief, I'm going to hear from the
12 defendants as to why, before I take up the injunctive
13 relief, I have to take up whether I have jurisdiction to
14 hear whether or not there's injunctive relief.

15 So my thinking is, what I think I'd like to do
16 today is have the defendant go ahead, if you are prepared
17 to, to explain the basis -- to do an argument on why the
18 case ought to be dismissed or under -- I think you have
19 12(b)(1) and 12(b)(6). I think there's several grounds
20 worth. And plaintiffs can listen and then, help inform
21 them as they prepare their responses, briefs that they
22 file. And then, after the defendant finishes explaining
23 to me why I shouldn't consider the preliminary injunction,
24 not because of the -- I'm not interested in they don't get
25 a preliminary injunction because they shouldn't get a

09:04:22 1 preliminary injunction. That we'll take that up later.

09:04:25 2 What I'd like to hear from the defendant is why I

09:04:26 3 shouldn't consider their request for relief at all because

09:04:28 4 they don't have standing or there's no jurisdiction.

09:04:31 5 Whatever those issues are to whether or not they have the

09:04:34 6 right to be here. And then, if the plaintiff wants to say

09:04:39 7 anything today in response to that, you're welcome to. If

09:04:42 8 you want to wait until the hearing a week from Monday, you

09:04:48 9 can. And then, once you hear their arguments, if the

09:04:52 10 plaintiff would like to make arguments why despite what we

09:04:55 11 heard, I still ought to consider taking up the preliminary

09:04:59 12 injunction or any other relief the plaintiff wants.

09:05:02 13 Despite what I've heard, I'll take that up from the

09:05:04 14 plaintiff and then, if there's any response that you all

09:05:09 15 want to have to that, that's fine.

09:05:11 16 But it's unlikely I'm going to resolve the

09:05:15 17 preliminary injunction dispute today. I'm planning on

09:05:19 18 taking that up a week from Monday when I have your

09:05:23 19 briefing -- when I have the plaintiffs' briefing. And

09:05:27 20 also at that hearing a week from Monday, I'll be able to

09:05:30 21 more robustly consider the -- assuming I don't go along

09:05:36 22 with what -- assuming I think they have standing and every

09:05:40 23 right to be here, then we'll take up fully the merits of

09:05:46 24 their right to injunctive relief.

09:05:47 25 That makes the most sense to me and so, unless

09:05:51 1 there is objection from the parties, that's the way we're
09:05:53 2 going to proceed. Yes, ma'am.

09:05:56 3 MS. PRATHER: Your Honor, can I just get some
09:05:57 4 clarification? So are you saying that we are able to
09:05:59 5 present our -- what is set today, which is the hearing on
09:06:03 6 the preliminary injunction?

09:06:05 7 THE COURT: I think -- I'll see once I hear from
09:06:09 8 them. I don't -- I have reservations about moving forward
09:06:14 9 on anything with respect to the preliminary injunction
09:06:18 10 until I've had a chance to resolve your right to be here
09:06:22 11 and that's -- and so, if you want to go ahead and do it,
09:06:27 12 you know, I've got the morning, I'm happy to hear it. If
09:06:29 13 you want to preview for them what it is, I'm happy to hear
09:06:33 14 that, too, and I'll just consider it -- I'll just say it's
09:06:38 15 part of the hearing and that I don't know that you'll have
09:06:43 16 -- I don't know that you have standing to do it but I
09:06:45 17 don't know that they'll -- I don't know that the
09:06:47 18 defendants would object to you making -- just making
09:06:49 19 argument today.

09:06:50 20 I'm not going to rule today on the motion with --
09:06:55 21 will the defendants have objections to allowing the
09:06:58 22 plaintiff to present some of their evidence to go ahead
09:07:00 23 and get that done today?

09:07:05 24 MS. CELLA: We don't object, your Honor.

09:07:07 25 THE COURT: Well, then I'll hear what you say

09:07:07 1 first, and then, I'll decide whether or not it's
09:07:14 2 appropriate for them to move forward.

09:07:15 3 MS. CELLA: Thank you, your Honor.

09:07:58 4 Okay. Thank you, your Honor. This case should
09:08:00 5 be dismissed because plaintiffs lack standing, defendants
09:08:02 6 are entitled to sovereign immunity, and the plaintiffs
09:08:04 7 failed to state a claim upon which relief could be
09:08:07 8 granted.

09:08:08 9 House Bill 900 will be referred to as READER. It
09:08:11 10 stands for the Restricting Explicit and Adult-Designed
09:08:14 11 Educational Resources. Simply put, READER is meant to
09:08:17 12 keep obscene, sexually explicit material out of public
09:08:21 13 school libraries in order to protect Texas children. And
09:08:23 14 we stand here before you today because plaintiffs seek to
09:08:26 15 place their own interests before the safety of the Texas
09:08:28 16 children this statute seeks to protect. It is not meant
09:08:33 17 to and does not infringe on plaintiffs' First Amendment
09:08:35 18 rights.

09:08:35 19 Plaintiffs lack standing because there is no
09:08:39 20 Article III case or controversy. Plaintiffs would have to
09:08:43 21 suffer injury in fact. The alleged injury would have to
09:08:47 22 be fairly traceable to the defendants. And the alleged
09:08:49 23 injuries would have to be redressable by a favorable
09:08:51 24 decision. None of those things are true here. The
09:08:53 25 plaintiffs have not suffered an injury in fact. When

09:08:56 1 they're seeking prospective relief and there's no imminent
09:08:59 2 injury, there is no injury in fact. Anything that they
09:09:03 3 are claiming is harm or injury is entirely speculative.
09:09:08 4 As we've just discussed, lists are not due until April 1st
09:09:11 5 of 2024. And we don't even know if there will be a
09:09:14 6 disputed rating.

09:09:15 7 The statute provides in relevant part that not
09:09:18 8 later than April 1st of 2024, library material vendors
09:09:21 9 have to submit their lists to TEA of any material rated
09:09:27 10 sexually explicit or sexually relevant. Those lists must
09:09:29 11 be updated by each year by September 1st, but the first
09:09:31 12 one is due on April 1, 2024. The TEA can review the
09:09:35 13 material rate -- the library material ratings. They don't
09:09:37 14 have to. There's nothing in the statute mandating that
09:09:39 15 they review every single list. So they may, they may not.

09:09:44 16 Any of this is all speculative. Vendors then
09:09:47 17 have 60 days to correct any ratings and then, notify TEA
09:09:50 18 of action taken. If the vendor fails to correct a rating,
09:09:54 19 the school district won't be able to purchase books from
09:09:57 20 them; but they can petition TEA to take them off of that
09:10:01 21 list and then, begin to sell books again.

09:10:06 22 So any economic injury here is actually from
09:10:09 23 school districts, it's not from the defendants. So
09:10:15 24 there's just too many things that are speculative. Will
09:10:19 25 TEA review the ratings? Will they not review the ratings?

09:10:22 1 Will the plaintiffs and any vendors disagree with those
09:10:26 2 ratings? This is all just speculative and we won't know
09:10:29 3 until after April 1st, 2024. Any alleged injury here is
09:10:34 4 not fairly traceable to the defendants. As I just alluded
09:10:37 5 to, any injury would come from school districts. There's
09:10:40 6 no economic injury that's going to be forced by
09:10:43 7 defendants. Plaintiffs --

09:10:43 8 THE COURT: Can they sue the school districts?

09:10:46 9 MS. CELLA: No, your Honor, they can't.

09:10:47 10 THE COURT: So you have a system where you're
09:10:50 11 saying there's no injury traceable to your defendants. It
09:10:55 12 would only be traceable to the school districts, but they
09:10:58 13 can get no relief from the school districts.

09:11:00 14 MS. CELLA: Well, the bill does say that, you
09:11:02 15 know, they --

09:11:02 16 THE COURT: That's a great -- I'd love to have a
09:11:04 17 situation where I could, you know, say I'm going to use my
09:11:09 18 friend's credit card and, you know, you can -- you can't
09:11:14 19 sue me for that because it's my friend's credit card.
09:11:17 20 But, you know, so who do they get relief from?

09:11:21 21 MS. CELLA: Well, your Honor, the problem here is
09:11:24 22 that there may not be relief to get. I mean --

09:11:26 23 THE COURT: Oh, no, no, that's not the problem.
09:11:28 24 That's if there is relief they need to get, who would they
09:11:31 25 get it from?

09:11:33 1 MS. CELLA: Well, it would have to be someone
09:11:36 2 that caused them harm, which is not the defendants.

09:11:38 3 THE COURT: I couldn't understand you.

09:11:38 4 MS. CELLA: It would have to be whoever caused
09:11:40 5 them harm, which here, would not be the --

09:11:41 6 THE COURT: And you just said it would be the
09:11:43 7 school districts and they can't sue the school districts.
09:11:45 8 So how would they get relief?

09:11:47 9 MS. CELLA: Well, your Honor, maybe the answer is
09:11:50 10 they can't. Maybe they have to rate these books and --

09:11:53 11 THE COURT: So your position on behalf of your
09:11:57 12 clients is that they can't.

09:11:58 13 MS. CELLA: Well, they can't sue my clients.
09:12:00 14 They can't get relief from my clients. Even if you said,
09:12:03 15 you know, this is totally unconstitutional and this isn't
09:12:08 16 going to happen, that still is not going to force the
09:12:12 17 school district to buy books from them. So Katy ISD in
09:12:16 18 their example.

09:12:16 19 THE COURT: I don't understand what you're
09:12:19 20 saying. What you said may have made sense and I just
09:12:24 21 didn't follow. What you're saying is, were I to go along
09:12:25 22 with the plaintiff and say that the law was uncon --
09:12:28 23 something, unconstitutional or, for some other reason,
09:12:33 24 infirm, even in that case, they couldn't get relief
09:12:36 25 against your clients. I think -- is that what you're

09:12:38 1 trying to say if I'm understanding you?

09:12:40 2 MS. CELLA: Well, I think we're understanding
09:12:43 3 each other. What I'm trying to say is, you know, let's
09:12:45 4 just say this bill didn't exist.

09:12:47 5 THE COURT: Okay.

09:12:48 6 MS. CELLA: Which is what plaintiffs are seeking
09:12:50 7 to do. So if the bill didn't exist but school districts
09:12:53 8 still decided not to buy books from them, from the
09:12:58 9 plaintiffs, the plaintiffs still aren't going to get any
09:13:01 10 relief. I mean, you can't make somebody buy something
09:13:03 11 from you.

09:13:04 12 THE COURT: Okay. But let's go back to the real
09:13:06 13 world. It does exist.

09:13:07 14 MS. CELLA: Yes.

09:13:08 15 THE COURT: And so, I'm still trying to find out,
09:13:10 16 figure out who do they get relief from if this -- if this
09:13:19 17 bill -- I'm not saying it is, but if it is
09:13:22 18 unconstitutional, for whatever reason, who do they get the
09:13:26 19 relief from?

09:13:27 20 MS. CELLA: Well...

09:13:29 21 THE COURT: And here's the problem, another
09:13:31 22 problem, I think, is that, for example -- I tried to do my
09:13:37 23 best to get ready for this, but isn't it that if the
09:13:43 24 publishers won't do something correctly, then isn't it --
09:13:47 25 who is it that TEA -- who fixes it for them if -- there's

09:13:52 1 something where if they don't get -- if they won't put the
09:14:00 2 appropriate -- if they put the not correct different
09:14:05 3 warning labels on, then what agency is it that fixes that
09:14:09 4 for them?

09:14:10 5 MS. CELLA: TEA.

09:14:10 6 THE COURT: Okay. And there's -- and my
09:14:13 7 understanding is, there's no appeal for what the TEA
09:14:16 8 decides, right?

09:14:16 9 MS. CELLA: I'm sorry.

09:14:17 10 THE COURT: If the TEA says, publisher, you got
09:14:19 11 it wrong, it shouldn't have been -- I'm gonna do my best.
09:14:22 12 Is it sexually explicit versus whatever the different
09:14:26 13 categories are? They have -- TEA has the right to say,
09:14:29 14 publisher, you got it wrong and we're going to do
09:14:31 15 something different and there's no appeal from that
09:14:33 16 either, right?

09:14:35 17 MS. CELLA: I believe that's correct, your Honor.
09:14:37 18 I haven't thought that through, but I do believe that is
09:14:39 19 correct. But the problem here is, they just haven't shown
09:14:41 20 any harm. We don't know if any of this is actually going
09:14:43 21 to happen. Nothing is imminent here.

09:14:44 22 THE COURT: Well, let's just say I don't agree
09:14:52 23 with that.

09:14:52 24 MS. CELLA: Okay.

09:14:53 25 THE COURT: I mean, you may be right. You may be

09:14:55 1 right that every school district doesn't -- I mean, yeah,
09:14:59 2 I guess that's right. But are you saying they have no
09:15:03 3 legitimate fear that it might happen?

09:15:05 4 MS. CELLA: I don't think so, your Honor. They
09:15:08 5 are fearing too many things so I mean --

09:15:10 6 THE COURT: Let me try this.

09:15:12 7 MS. CELLA: Sure.

09:15:13 8 THE COURT: If you're so sanguine that it might
09:15:17 9 not happen, well then, why do you care if I enter an
09:15:19 10 injunction? Because it wouldn't happen, anyway. I'm not
09:15:24 11 enjoining anything.

09:15:25 12 MS. CELLA: You wouldn't be enjoining anything as
09:15:28 13 far as the plaintiffs -- or, I'm sorry, as far as it just
09:15:33 14 depends of what you would enjoin. But here, this bill
09:15:35 15 doesn't only talk about these ratings. There's other
09:15:38 16 things that have to happen. TSLAC and TEA have other
09:15:40 17 obligations under this. They need to come up with
09:15:42 18 guidelines for certain things for school districts. So
09:15:45 19 it's not only this issue if you enjoin this bill. And
09:15:48 20 that would harm Texas children. I mean, that's the entire
09:15:51 21 point of this bill is to --

09:15:52 22 THE COURT: What would harm Texas children?

09:15:54 23 MS. CELLA: Enjoining this bill because then, TEA
09:15:56 24 and TSLAC would not come up with these other guidelines
09:16:01 25 that have nothing to do with the sexually explicit -- they

09:16:04 1 still have to make other guidelines for the schools
09:16:06 2 related to this bill, but that's not the only thing in
09:16:09 3 this bill.

09:16:09 4 THE COURT: Well, I can craft an injunction that
09:16:13 5 limits it to only these issues, can't I?

09:16:16 6 MS. CELLA: Sure. You could. It's just to --

09:16:19 7 THE COURT: I mean, I've got kids. I don't want
09:16:21 8 to hurt the kids of Texas.

09:16:23 9 MS. CELLA: Right. I mean, the problem is,
09:16:25 10 everything is just entirely too speculative. They're
09:16:28 11 claiming injury that hasn't happened and it's not
09:16:31 12 imminent. I mean, it's obviously not imminent because
09:16:34 13 their lists are not due trial April 1st, 2024. That's
09:16:38 14 over seven months from now.

09:16:40 15 THE COURT: Okay. I get that argument. And
09:16:42 16 actually, Ms. Prather, if you're prepared to respond to
09:16:47 17 that today, I'd like to hear that for sure. But I was
09:16:49 18 really hoping you were going to tell me -- talk to me
09:16:51 19 about the issues of standing.

09:16:53 20 MS. CELLA: Yes. Well, I am. The plaintiffs,
09:16:58 21 they'd have to suffer an injury in fact and I believe
09:17:01 22 that's what we were just discussing. And then, they'd
09:17:03 23 have prove that any alleged injury is fairly traceable to
09:17:06 24 the defendants. And the problem here is -- and maybe this
09:17:10 25 will clear up what we were just talking about. The

09:17:12 1 plaintiffs are attempting to sue the statute. The
09:17:14 2 defendants here --

09:17:14 3 THE COURT: I can't understand you.

09:17:17 4 MS. CELLA: The plaintiffs are attempting to sue
09:17:18 5 the statute. The defendants here, nothing is fair -- any
09:17:23 6 speculative injury, it's just not fairly traceable to the
09:17:26 7 defendants because the defendants have not done anything
09:17:28 8 and it's not imminent that they're going to do anything or
09:17:32 9 even -- there's been nothing, you know, that they're going
09:17:35 10 to threaten enforcement, that there's going to be
09:17:37 11 enforcement. We don't even know if they're going to
09:17:38 12 review the lists. They can under the statute.

09:17:40 13 THE COURT: Well, as long as they can, why isn't
09:17:44 14 there the potential for harm to these folks?

09:17:46 15 MS. CELLA: Eventually, there may be. It's
09:17:48 16 just --

09:17:48 17 THE COURT: I know -- okay. I don't know how to
09:17:54 18 do this thing. I hate to do this but, you know, when in
09:18:00 19 Roe v. Wade, you know, you could have said, well, maybe no
09:18:03 20 one will get pregnant and need an abortion so there's
09:18:07 21 really not any harm. I mean, I'm not following you -- I
09:18:14 22 get that it might not happen. I'm not following that it
09:18:19 23 won't -- that it can't happen. I guess the difference is
09:18:22 24 between you're saying it might not happen and I'm saying
09:18:25 25 -- and they're saying but it could and I'd like you to

09:18:29 1 address that in terms of the standing.

09:18:31 2 MS. CELLA: Yeah, I mean, it definitely could.

09:18:33 3 It is just entirely too speculative.

09:18:35 4 THE COURT: Well, why -- I'm going to try again.

09:18:41 5 Why is it -- I don't understand what you mean and maybe

09:18:45 6 you think you're explaining it. I don't understand why

09:18:47 7 you say it's too speculative. I'm not following.

09:18:51 8 MS. CELLA: We just don't know if there's going

09:18:53 9 to be an issue. We don't know if they're going to

09:18:54 10 disagree with ratings. We don't know that TEA is --

09:18:56 11 THE COURT: But it can, right?

09:18:58 12 MS. CELLA: Sure, it could. Sure.

09:18:59 13 THE COURT: Okay. And that's what the plaintiff

09:19:01 14 is unhappy about. That's what they're worried about. And

09:19:05 15 so, I was hoping -- if your only standing issue is that it

09:19:14 16 might not happen, then I'm probably ready to rule on that

09:19:14 17 today.

09:19:18 18 MS. CELLA: Well, that's not the only issue, your

09:19:18 19 Honor.

09:19:18 20 THE COURT: Well, then I'd like you to move on to

09:19:20 21 whatever other issues you have.

09:19:21 22 MS. CELLA: Sure. Defendants are also entitled

09:19:23 23 to sovereign immunity here. So should we get to --

09:19:23 24 THE COURT: Yes.

09:19:25 25 MS. CELLA: If you'd like to get to that, we

09:19:27 1 absolutely can. Sovereign immunity has not been expressly
09:19:32 2 waived. Ex Parte: Young exception, I believe the
09:19:35 3 plaintiffs addressed this in their reply. I haven't fully
09:19:38 4 digested their reply but it just -- it doesn't apply.
09:19:42 5 Plaintiffs can only overcome sovereign immunity when
09:19:45 6 they're seeking prospective injunctive relief based on an
09:19:48 7 alleged ongoing violation of federal law. There is no
09:19:51 8 violation at this point. I may have to address this in
09:19:54 9 the failure to state a claim. But I'd like to stay on
09:19:59 10 sovereign immunity right now, if that's okay.

09:20:01 11 Defendants lack sufficient connection to the
09:20:04 12 enforcement provisions of READER and, again, we're going
09:20:07 13 to get back to --

09:20:08 14 THE COURT: Maybe it's the sound. I just can't
09:20:10 15 understand you.

09:20:13 16 MS. CELLA: Sorry, your Honor. Defendants lack
09:20:14 17 any sufficient connection to the enforcement provisions in
09:20:17 18 READER and any allegation doesn't even include any
09:20:22 19 potential enforcement. So I think that the plaintiffs may
09:20:26 20 have claimed -- and this may be in the reply -- that the
09:20:30 21 state hasn't said it's not going to enforce it.

09:20:34 22 THE COURT: You're moving back into -- I want you
09:20:38 23 to stick with the sovereign immunity issue as to why they
09:20:41 24 don't have the right to be here. I mean, I understand the
09:20:45 25 Eleventh Amendment. I think there is a sovereign -- I'm

09:20:48 1 not saying -- I think there is one but I don't -- I'm not
09:20:51 2 understanding your articulation of it.

09:20:55 3 MS. CELLA: Yes. Well, your Honor, I mean, the
09:20:58 4 reason that defendants are entitled to sovereign immunity
09:21:00 5 is, it hasn't been waived and there's no exception that
09:21:02 6 applies, and there has been no ongoing constitutional
09:21:05 7 violation.

09:21:08 8 THE COURT: Okay. Anything else on sovereign
09:21:13 9 immunity?

09:21:13 10 MS. CELLA: Not on sovereign immunity, your
09:21:15 11 Honor. I mean, it is fully laid out in our brief. If
09:21:18 12 you'd like to go through that, we can, but I think that's
09:21:20 13 the main --

09:21:21 14 THE COURT: No. I'm giving you an opportunity --
09:21:24 15 anything you want to argue --

09:21:24 16 MS. CELLA: Yes. I understand. I mean, that's
09:21:26 17 the main point. It just hasn't been waived and there's no
09:21:28 18 exception that applies here. At this point, I can and I'm
09:21:34 19 prepared to go over that the plaintiffs failed to state a
09:21:37 20 claim upon which relief can be granted. I don't know if
09:21:39 21 that's something you want to do today.

09:21:41 22 THE COURT: I'd like to hear everything today. I
09:21:42 23 want to give the plaintiffs as much opportunity to hear
09:21:45 24 what your arguments are so they can respond to them
09:21:48 25 fulsomely in their briefs and then, we can be efficient on

09:21:51 1 Monday, a week.

09:21:51 2 MS. CELLA: Yes. Sure, your Honor. And these
09:21:53 3 are -- these are most of the same arguments that are
09:21:59 4 involved with the preliminary injunction. So I believe
09:22:01 5 plaintiffs have responded as far as their injunction, but
09:22:05 6 we'll go through them and we'll start there.

09:22:08 7 The plaintiffs just don't have a First Amendment
09:22:11 8 right in this forum. So this bill concerns government
09:22:14 9 speech. It doesn't concern plaintiff speech because it's
09:22:18 10 discussing and it's talking about school libraries. It's
09:22:22 11 not talking about plaintiff, you know, rating their books
09:22:25 12 for any other purpose other than school libraries. So
09:22:28 13 that's government speech and government speech is not
09:22:32 14 barred by the free speech laws.

09:22:33 15 THE COURT: I'm not following you why it's
09:22:36 16 government speech.

09:22:38 17 MS. CELLA: Well, it's government speech because
09:22:39 18 Texas state entities have wide authority over educational
09:22:43 19 policies and the Supreme Court has told us that education
09:22:48 20 of children is primary responsibility of parents,
09:22:51 21 teachers.

09:22:51 22 THE COURT: So let me see if -- I'm going to say
09:22:53 23 this and you tell me if I'm following you. That because
09:22:57 24 these books are destined for schools, then the regulation
09:23:05 25 -- the regulations that are imposed by the law that set

09:23:09 1 out different levels of sexual explicitness, that's a
09:23:20 2 government -- that's a government act and so, it becomes
09:23:23 3 government-controlled speech?

09:23:24 4 MS. CELLA: Yes, it's government-controlled
09:23:27 5 speech. Yes, it's government speech. It's not the
09:23:31 6 plaintiffs' speech. So the plaintiffs are claiming and
09:23:34 7 indicating that there are -- one of their fears is that
09:23:37 8 these ratings, people are going to think that it's their
09:23:40 9 speech but it's not.

09:23:41 10 THE COURT: I think I may be following you now.
09:23:45 11 That you are rejecting the idea that -- well, but I follow
09:23:53 12 you that it's the government that's doing it, but really
09:23:56 13 at the first cut, you're requiring them to make the
09:23:59 14 decision.

09:24:00 15 MS. CELLA: That's correct. Their lists are due.

09:24:03 16 THE COURT: So how is it government speech when
09:24:07 17 you're requiring them, the plaintiffs, to make the
09:24:12 18 decision themselves without advice by the government as to
09:24:16 19 how to do it?

09:24:17 20 MS. CELLA: Well, there is oversight by the TEA.
09:24:19 21 They are the ones that can review these lists.

09:24:20 22 THE COURT: Oh, they can review -- no. I get it.
09:24:22 23 They can review them. But what I'm saying is, how is it
09:24:26 24 not putting the weight on, you know, when I -- you know, I
09:24:35 25 want to put Of Mice And Men in the library and, you know,

09:24:42 1 there's a scene, you know, where it involves -- with
09:24:46 2 Lennie that involves rape. How do I -- I'm the publisher,
09:24:49 3 how do I rate that? Where does that fall in this group?
09:24:53 4 MS. CELLA: Well, again, that would be a call.
09:24:55 5 THE COURT: Made by who?
09:24:57 6 MS. CELLA: At first, the vendor but TEA --
09:24:59 7 THE COURT: Okay. So --
09:24:59 8 MS. CELLA: -- the state.
09:25:01 9 THE COURT: -- made by the vendor and that's one
09:25:02 10 of their concerns, right?
09:25:03 11 MS. CELLA: But the state has final say and have
09:25:06 12 oversight on that so it's not their speech.
09:25:08 13 THE COURT: Okay.
09:25:09 14 MS. CELLA: It's the state speaking.
09:25:11 15 THE COURT: But they're making the initial
09:25:13 16 decision.
09:25:14 17 MS. CELLA: Correct.
09:25:14 18 THE COURT: You are requiring them to make the
09:25:16 19 initial decision.
09:25:17 20 MS. CELLA: Correct. And in that case, your
09:25:20 21 Honor, they may rate that book as no rating and if the TEA
09:25:23 22 does not agree with that, they may change that if they
09:25:27 23 think it's incorrect and that is the state speaking. So
09:25:30 24 the state has final say. They have oversight over these
09:25:33 25 ratings.

09:25:34 1 THE COURT: And the state has the right to do
09:25:35 2 this because the books are ultimately going to be in
09:25:39 3 school libraries.

09:25:40 4 MS. CELLA: Yes, your Honor, public school
09:25:42 5 libraries, specifically. And on that same line of
09:25:49 6 thinking, a school library is not a public forum, it's a
09:25:52 7 nonpublic forum. If as long as the school facility or the
09:25:58 8 school has been reserved for its intended function, it's
09:26:02 9 not opened up by the school board for anybody to come in
09:26:05 10 for whatever reason. If it's -- if it is a -- reserved
09:26:09 11 for its intended purpose, there's no public forum. It's a
09:26:13 12 nonpublic forum.

09:26:14 13 THE COURT: I understand that.

09:26:15 14 MS. CELLA: And since Texas schools are nonpublic
09:26:18 15 forums, reasonable restrictions can be imposed. And it is
09:26:23 16 reasonable to restrict obscene, sexually explicit material
09:26:27 17 from being in schools, in public schools that, you know,
09:26:30 18 Texas children are there so this reasonable restriction --

09:26:34 19 THE COURT: Well, let's say for the moment I
09:26:36 20 agree with you on that. This isn't binary between obscene
09:26:45 21 and non-obscene. There are different levels, right?

09:26:50 22 MS. CELLA: Yes, your Honor.

09:26:51 23 THE COURT: And so, you're requiring -- if I
09:26:56 24 understand it, this is the question. This isn't a
09:26:59 25 declared statement. This is as I recall reading through

09:27:02 1 my brief -- the stuff I got on the briefing, there's --
09:27:07 2 this is my language that I'm not sure it's not exact. But
09:27:10 3 there are books, A Farewell To Arms probably gets a no
09:27:17 4 rating, right?

09:27:19 5 MS. CELLA: Without knowing, I would guess.

09:27:20 6 THE COURT: No. I'm saying there's a category
09:27:22 7 that's no --

09:27:22 8 MS. CELLA: Yes.

09:27:23 9 THE COURT: Category of no rating. And then, you
09:27:26 10 have books that are in the middle that have some sexual
09:27:34 11 content, and then, there are books that are obscene,
09:27:37 12 right? There are three, right?

09:27:38 13 MS. CELLA: Yes. Correct.

09:27:39 14 THE COURT: Now, let's say for a second that I
09:27:44 15 agree with you that if something is determined to be
09:27:47 16 obscene -- let's go full on and say that, for some reason,
09:27:53 17 they want to put something that has child pornography in
09:27:56 18 it. Just so we have something I think -- I hope even
09:28:03 19 plaintiffs would agree would qualify as obscene since I
09:28:05 20 actually sentence people for having it. So that would
09:28:08 21 have to be obscene if it's illegal so let's say that. I
09:28:13 22 get the argument -- it's a pretty easy argument, I think,
09:28:17 23 to keep things that are obscene out of public school
09:28:21 24 libraries.

09:28:22 25 But what is the justification for the middle

09:28:27 1 category?

09:28:27 2 MS. CELLA: Well, it's a reasonable restriction
09:28:30 3 and because it's a nonpublic forum, it's reasonable to
09:28:33 4 keep things that are sexually relevant but not maybe in
09:28:37 5 the obscene category into the hands of consenting parents.
09:28:41 6 So anyone can check that out of the library, a sexually
09:28:46 7 relevant book or material, as long as the parent says
09:28:50 8 that's okay and gives their consent.

09:28:54 9 The Fifth Circuit has said that reasonable
09:28:58 10 restric -- or, I'm sorry, the Supreme Court has said that
09:29:03 11 education is the primary responsibility of one of them,
09:29:06 12 parents.

09:29:07 13 THE COURT: As a parent, I'm kinda sympathetic to
09:29:11 14 that, too, but let me say this. And Ms. Prather or
09:29:20 15 whoever on her team can correct me if I'm wrong.

09:29:22 16 But if the TEA has this interest that you -- that
09:29:30 17 the majority of the legislature found to be appropriate,
09:29:36 18 why doesn't the TEA do it? I mean, if they want to go
09:29:42 19 through and say we're going to give the Lonesome Dove, you
09:29:48 20 know, because it has prostitutes in it, we're going to
09:29:54 21 give it the medium one and we're going to -- whatever,
09:29:54 22 child pornography, we're going to go through. Why isn't
09:29:57 23 that the job of the TEA and not of the book -- why does
09:30:03 24 the state get to require the publishers of books to make
09:30:09 25 these decisions?

09:30:11 1 MS. CELLA: Sure. So as you're aware, when the
09:30:13 2 legislature wants to do something, they will, but this is
09:30:15 3 a business --

09:30:15 4 THE COURT: That's why we have federal courts.

09:30:20 5 MS. CELLA: Yes, but this is a business
09:30:21 6 transaction. So if plaintiffs are seeking to sell books
09:30:24 7 in public schools and public schools have the right to
09:30:28 8 reasonably restrict material that's in there, if they want
09:30:31 9 to conduct that business transaction, this is what the
09:30:35 10 legislature has decided needs to be done.

09:30:37 11 Now, yes, TEA has oversight over that and it's
09:30:41 12 not -- it's not plaintiffs speaking. So a reasonable
09:30:45 13 restriction -- and that's not just on obscene material.
09:30:48 14 It's reasonable restrictions on education. But in this
09:30:53 15 context, obviously we're talking about sexually explicit
09:30:56 16 and sexually relevant library material. But this is a
09:31:00 17 business transaction is all it is. If the plaintiffs --

09:31:03 18 THE COURT: What I'm trying to get -- okay. I
09:31:06 19 was trying to avoid having to do this but let me -- I'm
09:31:11 20 trying to stay away from just the one -- because what I
09:31:22 21 really am most interested in hearing you talk about -- and
09:31:24 22 Ms. Prather may tell me I'm wrong. She may care about
09:31:26 23 both. But I think in terms of them having to decide what
09:31:28 24 is what, I'm sure she will.

09:31:29 25 But what I'm trying to figure out is, it seems to

09:31:34 1 me there may be a wide group of people who agree at some
09:31:40 2 level that sexually explicit material shouldn't be in
09:31:43 3 public schools and who has to make that decision. We can
09:31:47 4 fuss over TEA versus them, the publishers or whoever. But
09:31:54 5 what I'm trying to figure out is how the legislature can
09:32:00 6 require publishers to determine what is sexually relevant
09:32:08 7 that -- the middle category. And I get that the state has
09:32:14 8 the power to control what books go into public school
09:32:23 9 libraries. I get that. But how do they get to tell
09:32:26 10 publishers that they have to come up with a decision for
09:32:30 11 all books as to whether they are sexually relevant?

09:32:36 12 MS. CELLA: Sure. Well, again, because the
09:32:39 13 publishers and the plaintiffs, they want to sell books in
09:32:43 14 public schools. So if they are seeking to conduct that
09:32:47 15 business with the state, the public schools, then this is
09:32:52 16 one of the requirements and, you know, it's a partnership
09:32:56 17 with TEA. TEA has final say over the document -- I'm
09:33:01 18 sorry, over the ratings.

09:33:04 19 So in order for this partnership to work, the
09:33:07 20 publishers will have to rate books that they seek to sell.
09:33:10 21 TEA isn't seeking -- or, you know, the public schools
09:33:12 22 aren't seeking to sell anything, they just want to buy
09:33:16 23 something. So this is just -- this is strictly a business
09:33:19 24 transaction. We see this in contracts all the time. If
09:33:22 25 people want to contract with the state, there's certain

09:33:25 1 requirements they have to meet.

09:33:26 2 THE COURT: You're saying -- but that's a truism.

09:33:30 3 I mean, yes, that's true. That's true -- that's just

09:33:33 4 true. I'm trying to figure out -- so are you familiar

09:33:36 5 with -- my favorite painter is Carpaccio. Let's say they

09:33:44 6 want to have a book of Carpaccio whose -- everyone would

09:33:49 7 agree, he had some nudes in them. Who gets to determine

09:33:54 8 -- is that -- how does the state have the power to tell

09:34:00 9 the publisher they have to decide whether a book with

09:34:03 10 Carpaccio paintings is sexually relevant or not? That's

09:34:08 11 what I'm trying to figure out. How do they have the power

09:34:10 12 to force commercial entities to make that decision?

09:34:16 13 MS. CELLA: Because, your Honor, they're seeking

09:34:18 14 to sell that material, in this case, the book of

09:34:22 15 paintings --

09:34:22 16 THE COURT: No. I get they have the power.

09:34:25 17 Sure. They could tell -- what I'm saying, how do they get

09:34:28 18 to regulate on this issue? I mean, Michelangelo, I mean,

09:34:35 19 what -- I'm the lawyer for the book publisher, what do I

09:34:40 20 do with David? What do I do with the painting of David?

09:34:44 21 How does the publisher decide what's sexually relevant?

09:34:51 22 MS. CELLA: Well, it follows the statute, the

09:34:52 23 statute has guidelines for that. It references the penal

09:34:55 24 code. There's other guidelines for that. So I mean, the

09:35:00 25 statute is not vague in that way. Of course, it's not 100

09:35:04 1 percent perfect all the time.

09:35:05 2 THE COURT: No, no, no. I have it, 43.25, sexual
09:35:11 3 conduct, which is what is for sexually relevant, includes
09:35:15 4 or any portion of the female breast below the top of the
09:35:19 5 areola. I hope I didn't offend anyone there. But you
09:35:23 6 just included Michelangelo and Carpaccio.

09:35:27 7 MS. CELLA: Well, your Honor.

09:35:29 8 THE COURT: And you've required book publishers
09:35:32 9 to make that decision.

09:35:34 10 MS. CELLA: Initially, but again, TEA has
09:35:37 11 oversight of that. So, you know, maybe they pick up the
09:35:39 12 phone and call someone at TEA and say, hey, we're not sure
09:35:42 13 what to do with this. Or maybe they just don't rate it.
09:35:44 14 They give it no rating and then, TEA will review that.

09:35:49 15 THE COURT: Okay.

09:35:54 16 MS. CELLA: So in this way, there's just -- the
09:35:56 17 plaintiffs just -- there is no First Amendment right
09:36:01 18 because it's public school libraries and everything we
09:36:04 19 just talked about.

09:36:05 20 THE COURT: I think I heard you just say -- I
09:36:08 21 don't want to put words in your mouth -- that there are no
09:36:14 22 First Amendment rights in public school libraries?

09:36:17 23 MS. CELLA: For the vendors. I'm not talking
09:36:21 24 about any third-party students that may not be a part of
09:36:24 25 this lawsuit. But the vendors do not have a First

09:36:27 1 Amendment right in the public school library.

09:36:29 2 THE COURT: Okay. That's a pretty bright line.
09:36:33 3 I hope the other side's taking notes and you may be right.
09:36:36 4 I don't have any special expertise in this area or any
09:36:40 5 area as it turns out.

09:36:43 6 MS. CELLA: I don't think that's true, your
09:36:44 7 Honor. I think a lot of patent litigators would disagree
09:36:48 8 with you.

09:36:49 9 THE COURT: And I think most of them, actually,
09:36:49 10 the ones that lose, I think, would be the ones who would
09:36:52 11 agree the most.

09:36:55 12 MS. CELLA: But -- and again, even if the First
09:36:58 13 Amendment did apply -- we've discussed it doesn't, but if
09:37:02 14 it did, let's just say it did, intermediate scrutiny, not
09:37:05 15 strict scrutiny as the plaintiffs have mentioned, would
09:37:07 16 apply because this is commercial speech, which we've
09:37:11 17 already talked about.

09:37:12 18 THE COURT: I don't actually -- if you did, I
09:37:15 19 missed it. You might want to spend another minute or two
09:37:18 20 on the fact that this is commercial speech.

09:37:21 21 MS. CELLA: Sure.

09:37:22 22 THE COURT: And which is a little switch -- I
09:37:25 23 mean, I get that you're saying the government controls it
09:37:26 24 but I do think -- I would be interested in hearing your
09:37:30 25 thoughts about the fact that this is sale by businesses of

09:37:36 1 books and you're not restricting their sale of the books.
09:37:41 2 You are restricting them to rate the books and then, the
09:37:45 3 school -- I think you would say the schools can do with
09:37:47 4 them what they will. They can't take them if they're
09:37:51 5 sexually explicit, which I'm, again, carving out and we'll
09:37:54 6 take up a little bit later.

09:37:56 7 But I think I hear your argument that the law
09:38:04 8 doesn't really prevent the sale of them. It requires them
09:38:07 9 just to be rated and then, the schools do with them what
09:38:10 10 the schools decide to do with them. I think that's your
09:38:12 11 argument, right?

09:38:14 12 MS. CELLA: Yes, your Honor. As far as the
09:38:16 13 sexually relevant and the not-rated books. Even if a
09:38:18 14 book's not rated, a school wouldn't have to buy it. You
09:38:20 15 can't just force them to buy some book based on a rating.

09:38:25 16 THE COURT: Right. And that's your argument is
09:38:27 17 that because it's commercial free speech, that's
09:38:32 18 important, too.

09:38:33 19 MS. CELLA: Yes, your Honor, because commercial
09:38:35 20 speech in Houston Balloons & Promotions vs. City of
09:38:40 21 Houston tells us that speech is no more than a commercial
09:38:44 22 transaction. And the plaintiffs allege this is compelled
09:38:48 23 speech related solely to their economic interests and
09:38:52 24 their audience by describing goods. Well, they're trying
09:38:56 25 to sell goods, I mean, this is strictly a commercial

09:38:58 1 transaction and --

09:39:00 2 THE COURT: Understood.

09:39:02 3 MS. CELLA: -- the relevant question with the
09:39:05 4 commercial transaction is, does requiring plaintiffs to
09:39:08 5 rate books they seek to sell in Texas public schools
09:39:11 6 directly advance the governmental interests of regulating
09:39:15 7 the information to which Texas students are subject?
09:39:18 8 Without a doubt, the answer to that is yes. So because
09:39:23 9 this is commercial speech, even if the First Amendment
09:39:25 10 does apply, the test is intermediate scrutiny, not strict
09:39:29 11 scrutiny.

09:39:31 12 We have some other arguments in our brief, your
09:39:33 13 Honor. I believe you've read them. I don't know that we
09:39:37 14 need to go through them here unless you want to. But --

09:39:40 15 THE COURT: I'd like you to -- you know, we've
09:39:43 16 got the morning. I'd like to hear any arguments you care
09:39:46 17 to make now. We're not -- it's up to you.

09:39:50 18 MS. CELLA: Sure, your Honor. So I will just
09:39:51 19 talk about the vagueness and the overbreadth arguments
09:39:56 20 very briefly. And unconstitutional -- this is not
09:40:01 21 unconstitutionally vague. Perfect clarity is not
09:40:04 22 required. It just has to be --

09:40:05 23 THE COURT: I couldn't understand.

09:40:06 24 MS. CELLA: Sorry, your Honor. Perfect clarity
09:40:08 25 is not required for a statute. It just needs to have some

09:40:12 1 degree of certainty and here, the statute goes through how
09:40:15 2 to rate these books. It references the penal code. So
09:40:19 3 it's not like it just says rate these and good luck.

09:40:23 4 There's also oversight by TEA as we discussed.

09:40:28 5 THE COURT: Well, and I'll try one more time.

09:40:34 6 There certainly is -- this is my word, note yours.

09:40:37 7 There's the backstop of the TEA for if in their sole
09:40:50 8 discretion, they decide that something's been mislabeled,
09:40:52 9 that they can change it. I'm reluctant to say fix it but
09:40:57 10 they can change it.

09:40:57 11 But the -- again, I don't understand your
09:41:00 12 argument that the original -- that the burden is on the
09:41:13 13 publishers to do this and dare I say -- and I don't know
09:41:16 14 how active parents are. I'm not really sure -- I'm not
09:41:23 15 really sure who would be motivated to raise the issue of
09:41:28 16 the correctness of the -- you know, if a book -- you know,
09:41:37 17 if X book comes in and is rated as sexually explicit, I'm
09:41:42 18 not sure who's motivated to ask the TEA to re-rate it.

09:41:46 19 Let me ask you this. Is there any self-actuating
09:41:52 20 where the TEA -- is there someone at the TEA under the
09:41:55 21 statute who is tasked with making sure they get it right?
09:42:00 22 I mean, how does it work that they would come and change
09:42:05 23 the rating? Why would the TEA take Lonesome Dove that's
09:42:10 24 been rated as -- with no rating and change it to sexually
09:42:16 25 explicit, or vice versa? What would cause that to happen?

09:42:19 1 I understand it can happen but what would motivate that to
09:42:23 2 happen?

09:42:24 3 MS. CELLA: You know, your Honor, we haven't -- I
09:42:27 4 haven't thought that through yet. I think this is still
09:42:29 5 being worked out because this is a new --

09:42:31 6 THE COURT: That just occurred to me, too.

09:42:32 7 MS. CELLA: This is a new bill. But, you know,
09:42:34 8 it may be the case they don't review it or if something's
09:42:39 9 a glaring -- I mean, like you said, if it's something
09:42:42 10 that's clearly child pornography and it's not rated.

09:42:44 11 THE COURT: No, no. I'm leaving out -- I'll go
09:42:50 12 on the record if anyone's recording this, I'm against
09:42:53 13 child pornography and so -- and I don't think the
09:42:58 14 publisher can offer any defense that publishers ought to
09:43:02 15 be able to -- I don't think that's even something to --
09:43:05 16 but I just use that to do an easy of what should be kept
09:43:08 17 out.

09:43:09 18 But let me ask you this. In that it's unclear
09:43:13 19 what would cause the TEA to evaluate or reevaluate or
09:43:19 20 change what the status is, is that something that cuts in
09:43:23 21 your favor that means that the plaintiffs don't have any
09:43:29 22 harm, or is that something that cuts in their favor that
09:43:33 23 says that the statute is vague?

09:43:35 24 MS. CELLA: Sure. Well, the first thing I want
09:43:37 25 to say is, I am also against child pornography as I'm sure

09:43:40 1 the plaintiffs are. I was just using your example if they
09:43:43 2 rated that as no rating and it's clearly that should be
09:43:47 3 changed, it may cause them --

09:43:47 4 THE COURT: And my guess is -- my guess is
09:43:50 5 there's nothing that a legitimate book publisher is
09:43:53 6 putting out.

09:43:54 7 MS. CELLA: Sure.

09:43:55 8 THE COURT: Or that these plaintiffs are carrying
09:43:57 9 that would be considered in that area.

09:43:59 10 MS. CELLA: Yes, I would agree with that, your
09:44:01 11 Honor. But as far as what would cause TEA to rate it and
09:44:05 12 that being vague, I don't think that's vague. State
09:44:08 13 agencies can come up with their own internal workings. So
09:44:17 14 the way that they would decide what lists to look at or
09:44:20 15 not look at or maybe what books specifically to look at or
09:44:22 16 not look at, if that has been worked out, I have not
09:44:24 17 discussed that with my client at this point at the
09:44:29 18 preliminary injunction stage or the motion to dismiss
09:44:30 19 stage. So I can't give you a definite answer.

09:44:33 20 I could certainly get with them and see if
09:44:34 21 they've come up with anything, but at this point, I don't
09:44:37 22 have a definite answer. But I don't think that cuts
09:44:41 23 against the state just because they haven't written it in
09:44:44 24 the statute of how they're going to determine what lists
09:44:47 25 to look at or if they're going to look at them. That

09:44:50 1 doesn't make the statute vague. That's just a internal
09:44:53 2 working of a state agency.

09:45:00 3 And unless your Honor has any other questions
09:45:02 4 just for all the reasons we discussed and that are more
09:45:04 5 fully briefed in our motion to dismiss, we do ask this
09:45:07 6 court to dismiss plaintiffs' claims for lack of standing,
09:45:10 7 lack of jurisdiction, and failure to state a claim upon
09:45:14 8 which relief could be granted. Thank you, your Honor.

09:45:21 9 THE COURT: What I'm going to hear at least at
09:45:23 10 first from the plaintiff, if the plaintiff would like to
09:45:25 11 respond to anything they've heard, you're more than
09:45:29 12 welcome to. And then, if there's any argument that the
09:45:31 13 plaintiff wants to make as to any harm that might come to
09:45:35 14 them in the interim between now and when I can have the
09:45:38 15 next hearing and why should move forward today, I'm happy
09:45:41 16 to hear that, as well. I want to make sure that the
09:45:44 17 rights of the plaintiff are protected, as well.

09:45:46 18 The hearing was set today only because of my
09:45:52 19 trial docket and this was the date we had available. It
09:45:57 20 didn't really work the best for when everything could be
09:46:00 21 briefed. So I'm trying to give everyone a fair chance and
09:46:03 22 I now have an opening next week, which is why I want to
09:46:09 23 give everyone as much chance to brief and get ready as
09:46:12 24 long as your -- the plaintiffs' rights are protected, as
09:46:14 25 long as we have a hearing today and Monday and we'll get

09:46:19 1 something done by September 1st. But you're welcome to
09:46:23 2 say whatever you care to today that you think I need to
09:47:41 3 hear.

09:47:41 4 MS. PRATHER: Thank you, your Honor.

09:47:41 5 Your Honor, we're caught flatfooted this morning
09:47:45 6 because we're responding to papers we got about 36 hours
09:47:48 7 ago, but I'll do the best that I can and we'll certainly
09:47:51 8 supplement with followup briefing.

09:47:53 9 THE COURT: Let me just say this also. Obviously
09:47:58 10 they're going to listen to what you say. I mean, but if
09:48:01 11 there's something -- I'm going to give you an opportunity
09:48:04 12 when she finishes to respond to anything she says here
09:48:07 13 today, as well. Yes, ma'am.

09:48:10 14 MS. PRATHER: Your Honor, we represent a
09:48:13 15 coalition of book sellers, book publishers and authors
09:48:15 16 that sell books to Texas public schools, and the case here
09:48:19 17 today is about whether the state can require ratings of
09:48:23 18 books and adoption of those state ratings by the vendors.
09:48:28 19 I know we've been talking about publishers, but this is
09:48:32 20 also just the middleman, the bookstores. Not even the
09:48:35 21 people that produce the content. What the case is not
09:48:40 22 about is whether the books are excluded from school
09:48:43 23 libraries. This isn't about student speech. This is
09:48:48 24 about vendors being required to rate books and being
09:48:50 25 compelled to put the state's ratings on the books if they

09:48:54 1 disagree with the ratings that the vendor gave them.

09:48:58 2 So we are here challenging the constitutionality
09:49:01 3 of H.B. 900. And with regard to the reason why we need to
09:49:08 4 be here today and we need relief by September 1st, the
09:49:13 5 language in the statute is very clear. Under 35.002(a) --
09:49:24 6 and, your Honor, in your notebook, we've put a copy of the
09:49:27 7 bill in there. It is behind the third tab and you can go
09:49:33 8 to 35.002(a) and see that it requires a library material
09:49:38 9 vendor -- it says very clearly, a library material vendor
09:49:43 10 may not sell library materials to a school district unless
09:49:50 11 the vendor has issued appropriate ratings regarding the
09:49:56 12 sexually explicit material and sexually relevant material
09:50:00 13 previously sold to a district or school.

09:50:06 14 And so, right now, our clients are having to do
09:50:09 15 those ratings because as of September 1st, when this bill
09:50:14 16 goes into effect, according to Section 7 of the bill,
09:50:19 17 their sales will be cut off if they haven't provided the
09:50:22 18 ratings of the previous sales that they have done.

09:50:28 19 Section 6 of the bill also makes it clear that the act
09:50:33 20 applies beginning with the 2023 and 2024 school year,
09:50:38 21 which has already started. My kids are already in school.

09:50:42 22 So even though the ratings are not, quote,
09:50:45 23 unquote, due until April 1st under 35.002(c), which is
09:50:51 24 what the government keeps referring to, they're ignoring
09:50:55 25 35.002(a), which cuts off all sales starting September 1st

1 if those ratings aren't in. It's kind of like discovery
2 in a lawsuit. You have the discovery deadline, but it
3 doesn't mean you aren't supposed to be doing the discovery
4 the whole time before the deadline approaches and that's
5 what we have here.

6 These vendors are having to do these ratings
7 right now. And the problem with the ability to do the
8 ratings right now is, the law is unconstitutionally vague,
9 overbroad, they can't figure out how to do the ratings.
10 It's also simply cost prohibitive. We have testimony that
11 was provided during the Senate hearings talking about just
12 in six school districts alone, there were more than six
13 million items in their library. There are 1,200 school
14 districts in the state of Texas. That's an unfathomable
15 amount of retroactive ratings that will need to be done
16 before these book sellers can sell anything.

17 We also have Senate committee hearing testimony
18 based on a TPIA request, which is linked to in our reply,
19 where they asked Spring Branch ISD how much it cost to
20 review just one book, and it took 220 staff hours and cost
21 the district \$30,000 just to review that one book. So
22 when you look at the declarations, and they are behind the
23 fifth tab in your notebook, there is significant testimony
24 about the cost, about the uncertainty, and about the
25 inability to do what is being asked of them under the

09:52:54 1 statute.

09:52:55 2 And I know the plaintiff -- I'm sorry, the
09:52:59 3 defendants have talked here about a lack of standing.
09:53:04 4 They say that the injury is not traceable to the
09:53:07 5 defendants. But standing rules in First Amendment cases,
09:53:13 6 because of the importance of the constitutional issues and
09:53:15 7 the potential chilling effect, are actually slightly
09:53:20 8 different.

09:53:21 9 In a First Amendment case, an actual and
09:53:25 10 well-founded fear that the law will be enforced against
09:53:30 11 the plaintiffs suffices. And that's the Virginia II case,
09:53:35 12 which is in your notebook, we put twelve cases, kind of
09:53:37 13 the twelve most significant cases we think for the Court
09:53:40 14 to review. And it's under tab No. 12 in that notebook.
09:53:46 15 Also, the Susan B. Anthony case discusses the fact that
09:53:51 16 prior enforcement of a law is not required to establish
09:53:56 17 standing in a First Amendment case.

09:54:01 18 Your Honor asked the question of who do they get
09:54:03 19 relief from? Who do these vendors get relief from under
09:54:06 20 this law? And I'd refer you back to the bill itself
09:54:13 21 again. If you look at the bill under 35.004, the answer
09:54:22 22 is, they don't get relief. There's no avenue for relief.
09:54:25 23 There's no judicial recourse, which is another reason this
09:54:29 24 is unconstitutional. It basically absolves the school
09:54:36 25 districts, librarians, the employees of any liability to

09:54:41 1 the vendors. So the answer is to your question, who do
09:54:46 2 they get relief from, no one.

09:54:49 3 The harm here is that they actually start
09:54:55 4 reviewing of these books now, which is a costly and
09:54:58 5 essentially impossible process. The harm is also that
09:55:03 6 they can't sell books until they are rated and the harm is
09:55:08 7 that they have to agree with the state ratings. The other
09:55:13 8 thing that's been --

09:55:15 9 THE COURT: Well, I'm not sure why -- setting
09:55:19 10 aside everything else, assuming everything else is okay,
09:55:20 11 why it's a harm that they have to accept the state
09:55:26 12 ratings.

09:55:27 13 MS. PRATHER: Well, for one thing, your Honor,
09:55:29 14 it's compelled speech. If they disagree with those
09:55:31 15 ratings under 303 Creative, which was handed down June
09:55:35 16 30th by the U.S. Supreme Court, the government can't force
09:55:40 17 a private party to convey speech that they disagree with.

09:55:45 18 THE COURT: I'm not following that. I understand
09:55:49 19 what you're saying. But they're not -- I have a big
09:55:57 20 problem with them making y'all determine whether it's not
09:56:02 21 sexually explicit or is sexually explicit or is whatever
09:56:05 22 is next. And the remedy I hear from the other side, in
09:56:09 23 part, is, well, they're not -- they're doing the first cut
09:56:14 24 and I get why and all the problems you have with that.
09:56:15 25 But ultimately, it's the TEA because we get to come in and

09:56:21 1 we're the ultimate ombudsmen and get to say, you were
09:56:23 2 wrong, Lonesome Dove isn't X, it's Y. And that's -- but
09:56:29 3 at that point, it's no longer -- and help me why I'm
09:56:34 4 wrong. At that point, it's no longer your speech. It's
09:56:40 5 -- I'm not sure it's speech at all. I mean, we could
09:56:42 6 fight -- we'll fight over that. I'm sure you all will
09:56:44 7 fight over that. I get it's a ranking. But I'm not sure
09:56:48 8 how that at the point where the TEA comes in and they
09:56:52 9 modify it and it's now X -- Y instead of X, why that's
09:56:59 10 your compelled speech.

09:57:02 11 MS. PRATHER: I can help you with that, your
09:57:04 12 Honor. So if you go to the statute and you go to the
09:57:07 13 Section 35.003, that's where it talks about the agency
09:57:16 14 requiring the library materials to be rated, but then, it
09:57:20 15 also says if the agency determines that the material that
09:57:24 16 has been rated is not consistent with what they believe
09:57:29 17 the ratings should be, then the agency shall provide
09:57:34 18 written notice to the vendor of this corrected rating,
09:57:39 19 okay?

09:57:40 20 Then under the next section, it says no later
09:57:44 21 than the 60th day after the rating on which the library
09:57:48 22 material vendor receives this notice of the, quote,
09:57:51 23 unquote, corrected rating, the vendor shall rate the
09:57:57 24 library material according to the agency's corrected
09:58:01 25 rating. It requires the vendor to change their rating to

09:58:08 1 what the state believes it should be. And then, that
09:58:13 2 rating under 35.002(e) is posted on a website in a
09:58:23 3 conspicuous manner, well beyond the confines of Texas for
09:58:29 4 all the world to see that this vendor has rated the book
09:58:35 5 as whatever TEA told them to, right?

09:58:39 6 So they are compelling the vendor to apply their
09:58:46 7 corrected rating and if they don't under 35.003(c), two
09:58:53 8 things happen. One, they're publicly shamed. They're put
09:58:58 9 on a list on TEA's website as a vendor who has failed to
09:59:02 10 comply with the law. So they're publicly shamed. And,
09:59:07 11 two, under the next subsection (d), school districts are
09:59:12 12 prohibited from purchasing books from them. Any books.
09:59:17 13 Not just that book, any books.

09:59:21 14 And these book publishers, to the extent we're
09:59:24 15 talking about publishers as opposed to vendors, they have
09:59:26 16 lots of different lines. They have different imprints,
09:59:28 17 right? So Penguin Random House has a whole bunch of
09:59:32 18 different imprints that, you know, deal with a whole bunch
09:59:35 19 of different topics. It's unclear whether all of those
09:59:41 20 imprints are now banned, some of them are banned, we just
09:59:44 21 don't know. But it is clear that it's not just the book
09:59:47 22 at issue. The school districts are prohibited from buying
09:59:53 23 books from that vendor.

09:59:54 24 So the harm is real. The April 20 -- the April
09:59:59 25 1st date, it keeps getting bandied about here, is not a

10:00:05 1 date that we can work with because September 1 is the date
10:00:10 2 that the sales get cut off and the AG does not -- they
10:00:16 3 have not said we're not going to enforce this. There's
10:00:20 4 been no statement made to that effect. And under the
10:00:23 5 Consumer Data Industries case --

10:00:25 6 THE COURT: What role -- I didn't get it. What
10:00:29 7 role does the AG play in the enforcement of is?

10:00:35 8 MS. PRATHER: I don't know. I mean, good
10:00:36 9 question, your Honor.

10:00:36 10 THE COURT: That's not something I got prepared
10:00:38 11 on.

10:00:39 12 MS. PRATHER: I don't know. Let me rephrase it a
10:00:41 13 different way. No one, no state agency has made any
10:00:46 14 assurance that they won't enforce this law. So we are
10:00:54 15 sitting here in a position where the law goes into effect
10:00:57 16 on September 1st. Even if the Court were inclined to
10:01:00 17 accept the AG's interpretation, under Virginia II, the AG
10:01:07 18 cannot bind the legal interpretation of this statute. So
10:01:13 19 I don't think standing is an issue. I think a lot of the
10:01:16 20 response in our case, and I guess not surprisingly, was
10:01:21 21 procedural, not substantive.

10:01:23 22 So from a procedural standpoint, we've
10:01:28 23 established standing. I think the next issue that the
10:01:31 24 defense brought up was sovereign immunity. This case
10:01:35 25 falls squarely within the Ex Parte: Young exception. That

1 exception applies when a suit seeks prospective injunctive
2 relief from the state actor based on an alleged ongoing
3 violation of the Constitution. We are right within those
4 goal posts. The K.P. vs. Leblanc case, which is cited at
5 page 6 of our reply, it's a Fifth Circuit case, is
6 squarely on point.

7 The drone constitutional challenge, which Judge
8 Pitman handled last year, NPPA vs. McCraw held that Ex
9 Parte: Young exception applied in very circumstances. And
10 just a little excerpt from that case talks about
11 plaintiffs having no way of knowing whether the defendants
12 will enforce the law moving forward. Defendants have
13 provided no binding assurance and the Supreme Court has
14 noted that we would not uphold an unconstitutional statute
15 merely because the government promised to use it
16 responsibly. The First Amendment protects against the
17 government. It does not leave us at the mercy of noblesse
18 oblige.

19 Given the possibility of enforcement and the duty
20 of defendants to do so if a relevant situation arises, the
21 Court finds that plaintiffs have established sufficient
22 connection to enforcement for defendants to fall within Ex
23 Parte: Young exception to sovereign immunity. That's from
24 Judge Pitman.

25 But your Honor probably remembers your own case,

10:03:17 1 the Calhoun vs. Collier case in which you made a similar
10:03:21 2 argument.

10:03:21 3 THE COURT: I probably don't but you're kind to
10:03:25 4 say I would.

10:03:28 5 MS. PRATHER: I understand. I think the third
10:03:30 6 issue that was discussed was that somehow this is
10:03:33 7 government speech. We talked a little bit about this.
10:03:36 8 It's not government speech. This is speech that's being
10:03:39 9 forced upon vendors by the government. This isn't speech
10:03:43 10 in libraries. This is speech that is being forced on
10:03:47 11 vendors to put on public websites for all the world to see
10:03:51 12 as though it is its own. If it were government speech,
10:03:57 13 then the government should be the one doing the ratings
10:03:59 14 and posting it as their ratings and that didn't happen. I
10:04:01 15 mean, let's look at the legislation that passed.

10:04:04 16 Note that it did not require schools or
10:04:09 17 librarians or any governmental body to issue these ratings
10:04:12 18 and why? Because that would have been unfunded mandate.
10:04:16 19 Instead, they pushed it off on the vendors, private
10:04:21 20 parties that should not be subjected to compelled speech.
10:04:28 21 The removal of books is also something that is, you know,
10:04:33 22 a hot topic these days. It's something that Judge Pitman
10:04:35 23 handled earlier this year, as well, in the Llano County
10:04:41 24 case. And I've got a copy. This is not in our notebook
10:04:45 25 because this had to do with the reply which was filed late

10:04:48 1 last night. So I've got a copy for the Court and for
10:04:57 2 opposing counsel.

10:04:57 3 THE COURT: That actually, I'm pretty familiar
10:04:59 4 with.

10:05:01 5 MS. PRATHER: So in that case, Judge Pitman
10:05:02 6 rejected the argument that book removal decisions were
10:05:08 7 government speech.

10:05:09 8 THE COURT: But that's on appeal right now,
10:05:13 9 right?

10:05:13 10 MS. PRATHER: It is. There's another case that
10:05:16 11 is in your notebook, tab 4, it's a case involving
10:05:22 12 Fayetteville public libraries. This case was handed down
10:05:26 13 literally days ago, July 30th, has a similar analysis
10:05:28 14 about why removal of books is not government speech.

10:05:34 15 I think the fourth issue that was brought up by
10:05:37 16 the defendants was school libraries and then being not
10:05:40 17 public forums. This misses the mark. I mean, once again,
10:05:44 18 we're not talking about speech in school libraries. We're
10:05:47 19 talking about speech being forced on private parties that
10:05:49 20 are vendors. This isn't about what -- you know, what
10:05:54 21 discussion can be held by a student in a school library.
10:05:59 22 And most of the cases, if not all of the cases cited by
10:06:01 23 the defendant in their brief, the Hazlewood case and
10:06:04 24 others, dealt with student speech that's inapplicable
10:06:08 25 here.

10:06:11 1 Here, we've got a situation where under Pico and
10:06:17 2 under Campbell, this does not -- the public forum issue
10:06:25 3 simply does not apply. School libraries in both of those
10:06:30 4 cases were designated public forums for the receipt of
10:06:36 5 information and content-based restrictions cannot be
10:06:40 6 imposed unless the government meets strict scrutiny. But
10:06:45 7 again, we are not even talking about speech in the school
10:06:50 8 library. We're talking about private parties.

10:06:57 9 I think the last point was about -- or actually,
10:07:00 10 second to last point was about commercial speech and
10:07:04 11 commercial speech is also not relevant in this context.
10:07:10 12 This is not commercial speech. This is not speech
10:07:16 13 inviting a commercial transaction. This is forcing a
10:07:19 14 vendor to rate books in a way in which they don't
10:07:23 15 necessarily agree. It's also not -- the rating of books,
10:07:29 16 forcing vendors to rate books is not an essential
10:07:31 17 operation of government. Making decisions about what goes
10:07:35 18 into a library may be an essential government function,
10:07:39 19 but those decisions can be made without forcing vendors to
10:07:43 20 adopt and endorse the ratings of the state simply is not
10:07:51 21 commercial speech.

10:07:52 22 Your Honor, opposing counsel started to get into
10:07:55 23 vagueness. Vagueness and overbreadth arguments. They
10:08:01 24 didn't address any of the four examples of vagueness that
10:08:03 25 we provided in our papers. I think the Court raised a

1 valid concern: How do we know what criteria TEA is
2 considering when they do change the ratings? But the
3 reality is, this entire statute is one that is fatally
4 flawed by significant vagueness of a number of the various
5 terms in it.

6 So I would like to be able to get into some of
7 our discussion today. I don't know if the Court wants us
8 to or not, but with regard to bringing up vagueness and
9 overbreadth, I think we've brought up issues that pertain
10 to the unconstitutionality of the statute.

11 THE COURT: I think it would help me here on the
12 vagueness issues for sure.

13 MS. PRATHER: Sure.

14 THE COURT: So I can -- the more information I
15 have today, the easier it will be for me to get an order
16 out in a timely manner.

17 MS. PRATHER: So we believe that the statute
18 fails for six different reasons, okay? We've got -- let
19 me back up. Six different reasons. The first of which
20 is, it compels speech, right? We've talked about that
21 briefly. It compels the booksellers to adopt the
22 government's views that they may disagree with. On
23 vagueness, it provides -- it fails to provide clear
24 standards for these vendors to apply when they are
25 attempting to rate the books. It actually functions as an

10:09:50 1 unconstitutional prior restraint because it gives the
10:09:54 2 state that exclusive control over what books are allowed
10:09:57 3 in public schools without any judicial review, which is
10:10:00 4 what you touched upon.

10:10:04 5 We believe it fails the strict scrutiny analysis
10:10:08 6 because it is content-based on its face. It's a
10:10:12 7 content-based regulation and it's not narrowly tailored or
10:10:17 8 the least restrictive means of advancing or compelling a
10:10:21 9 government interest, and we believe it's overbroad. It
10:10:23 10 prohibits a wide swath of constitutionally protected
10:10:28 11 speech and that's a significant problem.

10:10:31 12 Finally, the sixth ground, and we're just going
10:10:35 13 to rely on our briefing on this, it unconstitutionally
10:10:39 14 delegates government authority to regulate speech to
10:10:42 15 private individuals, these vendors and book publishers
10:10:46 16 that are going to have to be doing these ratings. We
10:10:49 17 think that we actually win on all six grounds, but you
10:10:51 18 only need to find one to be able to enjoin the law.

10:10:56 19 If the law isn't enjoined by September 1st, not
10:11:01 20 only will the plaintiffs but countless others will suffer
10:11:05 21 irreparable injury because they won't be getting the
10:11:08 22 books. Lucy Podmore, who's a San Antonio librarian,
10:11:13 23 talked about the fact that she can't order books right now
10:11:18 24 and that's going to be a harm to her students. Katy ISD
10:11:23 25 has already announced publicly, they're not buying any

1 books. That's a harm not only to the vendors but to the
2 students who want and crave the ability to expand their
3 knowledge base.

4 So we talked about why we're here now. And the
5 key provisions in the statute, the library standards, the
6 ratings, the fact that there's this automatic override, we
7 didn't mention earlier, as well, that those books that are
8 listed as sexually explicit -- and this, in part, goes to
9 the vagueness issue -- have to be recalled. There's
10 nothing that explains how that recall works. How does it
11 happen? Do you have to recall books that you no longer
12 sell? I mean, one of the things, practically speaking, is
13 these vendors don't necessarily sell the books anymore,
14 but they're being told they have to rate any book they've
15 ever sold to the school district that's still in active
16 use. Another question is, how do the booksellers know
17 what is in active use?

18 And then, we discussed the blacklist and the lack
19 of judicial oversight. So when discussing the key
20 provisions and the inability to actually understand and
21 apply them, we've got this one that deals with sexually
22 relevant, one that deals with sexually explicit. But the
23 key thing here is that those definitions are highly
24 subjective and can easily result in inconsistent ratings.
25 There's also nothing in the law that addresses the

1 inconsistent ratings. Another thing that's not in the law
2 that's extremely problematic is, there's no
3 differentiation as to age. The age of the child at issue.

4 So, for instance, I have four children. That's a
5 lot. There's a big age gap in my kids, 10 and 12 years.
6 My children when they were five and their older sisters
7 when they were 15 and 17 were reading very different
8 books. But under this law, there's no differentiation and
9 so, those young adult readers will be deprived of content
10 that is entirely appropriate for them because the law will
11 have to be applied to address the least common
12 denominator, what the five-year-olds read. It's a
13 problem.

14 Now, we can go through what the definitions say
15 and the problems with the definition. The biggest
16 problem, honestly, your Honor, is these are like
17 Frankenstein definitions, okay? What the legislature did
18 -- and I know everyone sort of calls it sausage making,
19 right -- is they cut and pasted portions of the penal code
20 and undefined terms in case law to make entirely new
21 definitions, which inherently results in this vagueness
22 problem, right?

23 So for sexually relevant material, they took some
24 part of the Texas Penal Code. They basically referred to
25 the Texas Penal Code's definition of sexual conduct and if

10:15:21 1 you look in your notebook, we have these provisions of the
10:15:26 2 penal code in there. It's behind the statutory
10:15:32 3 references. So I'm going to go there and look and you'll
10:15:35 4 see that the Texas Penal Code is under tab 3. Sexual
10:15:41 5 conduct is one part of that definition, but it seemingly
10:15:48 6 encompasses all books that mention any sexually related
10:15:52 7 topics.

10:15:55 8 So that difference in the inability to determine
10:15:57 9 the age of the reader and factor that in is critical here.
10:16:03 10 If you look at -- your Honor mentioned your favorite
10:16:06 11 painter and David, the statue David, right, and does that
10:16:11 12 fall within the sexually relevant definition. I think
10:16:15 13 it's a question. I think it's a valid question. We've
10:16:18 14 got Pulitzer Prize-winning photos like the one on the
10:16:22 15 screen now. This is the Terror Of War. This is the
10:16:25 16 Pulitzer Prize-winning photo that depicted a 10-year-old
10:16:31 17 girl completely naked, running away after a napalm bomb
10:16:35 18 had been detonated in her town in Vietnam -- in her
10:16:38 19 village in Vietnam. Is that going to be banned? Don't
10:16:42 20 know. Do the vendors need to rate that as sexually
10:16:47 21 relevant because it shows naked -- a naked person?

10:16:53 22 Sexually explicit is actually even more difficult
10:16:56 23 because -- and the AG here has said -- and I think this is
10:17:04 24 really telling in their briefing, they said we attempted
10:17:09 25 to mirror the definition of obscenity, which acknowledges

1 that they didn't mirror the definition of obscenity.

2 We have the definition of obscenity in our Texas
3 Penal Code. If you look under the first tab behind the
4 definitions -- statutory definitions section, you'll see
5 43.21(a)(1) defines obscenity and that definition is
6 entirely consistent with the U.S. Supreme Court's
7 definition under Miller vs. California. That tells you
8 what is and isn't constitutionally protected. That is not
9 what the legislature incorporated into the law.

10 Instead, they went beyond that and only tied the
11 definition to patently offensive, which is 43.21(a)(4).
12 By doing that, the definition is fatally constitutionally
13 flawed because now they have encompassed in their
14 definition constitutionally protected material that will
15 be restricted from access for anyone. So that is the fact
16 that they left out whether a work has social or literary
17 value and considering the work as a whole is fatal to
18 their point.

19 Those two factors under Reno vs. ACLU must be
20 included to avoid the sweep of constitutionally protected
21 information. They didn't do that. They could have, they
22 didn't.

23 They also have the definition of sexually
24 explicit tied to community standards, but they don't
25 define community standards. So Texas has a whole a lot of

10:19:27 1 counties, right? I think 252. Community standards in
10:19:32 2 Austin, Texas are very different than the community
10:19:35 3 standards in Pecan Gap. So what community standards are
10:19:39 4 these vendors supposed to apply? Unknown, vague, unclear.
10:19:46 5 There are so many different problems with these
10:19:48 6 definitions and the inability for the vendors to apply, it
10:19:54 7 is difficult to even go through them.

10:19:55 8 But the fact that it is not tied to the
10:19:59 9 definition of obscenity is fatal. The fact that they have
10:20:04 10 to weigh and balance these highly subjective,
10:20:07 11 fact-specific standards is unconstitutionally vague. And
10:20:14 12 the fact that there's no age-appropriate distinction is
10:20:17 13 also incredibly problematic. That was one of the big
10:20:21 14 issues in the Fayetteville case that was handed down last
10:20:26 15 month.

10:20:30 16 One of the things worth mentioning when it comes
10:20:34 17 to young adult readers, there are novels like Rescuing
10:20:40 18 Hope by Susan Norris or Sold by Patricia McCormick. Both
10:20:45 19 of these raise awareness about the horrors of child sex
10:20:49 20 trafficking. Those books would no longer be available and
10:20:53 21 why is that a problem? Well, it's a problem because Texas
10:20:58 22 is number two in the nation in the number of child
10:21:02 23 sex-trafficking occurrences. And the average age of a
10:21:07 24 child that is trafficked is 12 to 14 years old. They need
10:21:11 25 to be aware of the phenomenon. This will inhibit their

10:21:14 1 ability to be aware of matters of public concern like
10:21:18 2 that.

10:21:18 3 The law is impossible to comply with. We've
10:21:24 4 talked about that. We've got declarations, the tab behind
10:21:30 5 your notebook, declaration provisions that discuss this.
10:21:35 6 One of the very real problems is, some of our clients,
10:21:39 7 some of the plaintiffs here today have been in business --
10:21:42 8 they've had the good fortune of being in business for a
10:21:43 9 really long time. BookPeople has been in business for 53
10:21:47 10 years. Imagine the different recordkeeping that exists
10:21:53 11 over 53 years going from no computers to computers, going
10:21:58 12 from no Windows to Windows, going from no Excel to Excel.
10:22:02 13 They have absolutely no way of tracking all the books that
10:22:06 14 they've ever sold and they don't know what's still in
10:22:09 15 active use by the schools.

10:22:16 16 Here, we've got somebody who -- this is Lucy
10:22:24 17 Podmore.

10:22:31 18 MS. CELLA: Your Honor, we would object to any
10:22:33 19 video that --

10:22:36 20 (Audio and video file played.)

10:22:45 21 MS. CELLA: Your Honor.

10:22:45 22 MS. PRATHER: I'm sorry.

10:22:46 23 THE COURT: We'll take that up at the next
10:22:48 24 hearing if we need to hear it.

10:22:49 25 MS. CELLA: Thank you, your Honor.

10:22:51 1 MS. PRATHER: Can I play this?

10:22:52 2 THE COURT: No. We'll take it up at the next
10:22:53 3 hearing if we need to hear it.

10:22:56 4 MS. PRATHER: Okay. What Ms. Podmore testifies
10:23:02 5 to is the fact that this is simply inconceivable. Six
10:23:08 6 districts in the state of Texas have millions of copies of
10:23:13 7 books to be done. I also think it's worth noting that the
10:23:18 8 fiscal note on this bill was \$2.6 million. Now, that's
10:23:22 9 just the note for the state that's not having to do the
10:23:25 10 ratings, right? Think about the cost to the vendors that
10:23:28 11 are having to do the ratings. The cost to the state was
10:23:34 12 over half-a-million dollars just to hire two people to
10:23:37 13 review those books that weren't rated. So it's clearly
10:23:44 14 going to put small businesses like BookPeople and others,
10:23:53 15 Blue Willow, another one of our clients, out of business.

10:23:58 16 I don't know if your Honor wants me to get into
10:24:00 17 the preliminary injunction piece of this.

10:24:04 18 THE COURT: No. I'm not going to take that up
10:24:06 19 today. I'm sure I understand these issues pretty well --
10:24:10 20 I mean, at the eye level and I can take that up on next
10:24:14 21 Monday.

10:24:14 22 MS. PRATHER: Okay. So we've talked a little bit
10:24:15 23 about vagueness. I have more discussion about vagueness
10:24:17 24 we can go over at the next hearing if your Honor would
10:24:19 25 like but same with overbreadth. But as you can see --

10:24:23 1 THE COURT: I'm happy to hear both vagueness and
10:24:26 2 overbreadth so that I can hear from -- either today or
10:24:29 3 next week, I'll hear a response to that. I mean, I'm
10:24:33 4 happy to take up those issues today.

10:24:35 5 MS. PRATHER: Okay. Then I'll have to flip
10:24:38 6 through some stuff.

10:24:44 7 So unconstitutional vagueness, law's
10:24:51 8 unconstitutionally vague if it fails to provide those
10:24:53 9 targeted by the statute with the reasonable opportunity to
10:24:56 10 know what conduct is prohibited. Or if it's so indefinite
10:25:00 11 that it allows arbitrary and discriminatory applications.
10:25:07 12 In the drone case, this was one -- this standard was
10:25:12 13 outlined and the drone statute was found to be
10:25:17 14 unconstitutionally vague.

10:25:20 15 We have at least four provisions of the law that
10:25:22 16 we are challenging. We believe there are quite a bit
10:25:27 17 more. But one of them is the requirement that books that
10:25:32 18 don't have to be related -- or don't have to be rated are
10:25:35 19 those related to the curriculum. The second is that the
10:25:40 20 definitions of sexually relevant and sexually explicit are
10:25:44 21 unconstitutionally vague. The third is this highly
10:25:48 22 subjective contextual analysis that is being required for
10:25:53 23 the vendors. And the fourth is, there's no guidance for
10:25:58 24 what recall or active-use determinations can be made.

10:26:06 25 In the declarations provisions part of your

10:26:09 1 notebook, this is where all of the declarations of our
10:26:12 2 clients are, behind tab 4, it has a whole list of
10:26:15 3 testimony from plaintiffs about how they're struggling
10:26:20 4 with the ambiguity in the law and their concerns about
10:26:22 5 being able to comply with it. It is worth noting that in
10:26:33 6 the response by the state, none of the four areas that
10:26:38 7 we're getting ready to discuss were addressed. They
10:26:41 8 simply recited the test for vagueness.

10:26:45 9 So let's start with directly related to the
10:26:47 10 curriculum. Here's the problem. There's no statewide
10:26:54 11 curriculum in Texas. Curriculum vary. They vary from day
10:27:01 12 to day, year to year, district to district. They're
10:27:06 13 regularly reevaluated. Vendors are not told about these.
10:27:10 14 Vendors are not part of the equation when it comes to
10:27:12 15 curriculum changes. There's also no clarity as to if a
10:27:18 16 teacher brings a book into a classroom, does that now
10:27:20 17 become part of the curriculum?

10:27:23 18 What about books that are selected by a student
10:27:26 19 from a classroom library where they get to choose what
10:27:29 20 books they read, are those books part of the curriculum?
10:27:33 21 Does it have to be taught in the classroom? There's no
10:27:38 22 clarity in any of this. And as the owner of Blue Willow
10:27:42 23 said, there's no realistic way of ascertaining the
10:27:46 24 curriculum for students' grade levels, classrooms in each
10:27:49 25 of the Texas districts to which they sell books. It

10:27:53 1 simply can't be done.

10:27:58 2 The definitions are with regard to sexually
10:28:02 3 explicit and sexually relevant, we've talked about them
10:28:05 4 briefly, but they're both unclear and overinclusive. If
10:28:10 5 you look at the sexually relevant definition and the words
10:28:15 6 that you relayed earlier in the hearing, it would apply to
10:28:18 7 religious texts like the bible. There's incest in the
10:28:22 8 bible. There's all kinds of sexual acts in the bible. Is
10:28:26 9 that now sexually relevant or sexually explicit? Should
10:28:30 10 it be banned? And why should the vendor be the one to
10:28:33 11 make that determination?

10:28:38 12 There are books that would be banned under these
10:28:41 13 definitions out of fear for getting crosswise with TEA,
10:28:45 14 and a lot of those books were highly acclaimed classic
10:28:49 15 novels, books like Atlas Shrugged, Friday Night Lights,
10:28:54 16 The Color Purple, which is not only a Pulitzer
10:28:57 17 Prize-winning book, it's an Academy Award-winning film.
10:29:02 18 The Catcher In The Rye, Rescuing Hope, and others.

10:29:10 19 The contextual analysis, which is under 35.0021
10:29:18 20 of the statute, it actually tells a vendor how they're
10:29:21 21 supposed to go about this analysis. It's not only
10:29:26 22 convoluted, it's unclear, it's highly subjective, and it
10:29:29 23 will result in a widely disparate rating for each book.
10:29:36 24 And that is something that our clients in their
10:29:41 25 declarations have expressed concerns about. The lack of

10:29:45 1 specificity in the book ban will inevitably lead to
10:29:48 2 inconsistent ratings among our members and the broader
10:29:52 3 bookselling community. So there's nothing in here that
10:29:56 4 talks about what happens if they have inconsistent
10:29:59 5 ratings. Nothing.

10:30:01 6 But there is clarity in the law that a law is
10:30:06 7 unconstitutionally vague if it is so indefinite, it allows
10:30:11 8 arbitrary and discriminatory enforcement, which is exactly
10:30:15 9 what would result here. The plaintiffs don't know how to
10:30:25 10 rate the books. It's just that simple. They don't know
10:30:27 11 because of the vague definitions and because of the
10:30:30 12 subjective criteria.

10:30:33 13 Another point that is part of the subjective
10:30:36 14 criteria is that they are supposed to weigh and balance
10:30:41 15 three factors. Again, these are cut and pasted from other
10:30:44 16 provisions in the law. One of which is -- includes
10:30:51 17 determining the author's intent. How in the world is a
10:30:55 18 vendor going to determine what the author intended?
10:31:00 19 Getting into the state of the mind of the author is an
10:31:02 20 impossible task for a vendor or anyone other than the
10:31:06 21 author.

10:31:08 22 It also eschews the review of the work as a
10:31:14 23 whole. That's contrary to Miller vs. California and that
10:31:18 24 impedes the ability to do a proper contextual analysis.
10:31:23 25 Finally, as we've talked about before, it fails to

1 consider the literary and artistic value of the work as
2 required by the Constitution.

3 The last area of vagueness that we bring up and
4 we're not saying this is the -- these are the only four
5 examples. We're just saying these are four of many
6 examples -- is this requirement for booksellers to recall
7 books deemed sexually explicit if they are still in active
8 use. So the recall doesn't describe how that is executed
9 or what happens if a book isn't recalled. Does it mean
10 that the bookseller has to give a credit for those books?
11 Who knows.

12 Active use, similarly not defined. And there's
13 no way for a vendor to find out if something is or is not
14 in active use in all of the counties in the state of
15 Texas. So these areas are completely untenable for a
16 vendor to be able to even attempt to rate the books and
17 comply with the law and certainly can't do so by September
18 1st.

19 I'll skip ahead briefly to the overbroad issue.
20 Like I said, we've got other constitutional infirmities to
21 address, the compelled speech, the prior restraint, we
22 could talk about that at the next hearing. But with
23 regard to the law being unconstitutionally vague, the
24 problem here is that it captures constitutionally
25 protected speech. By not tying to it the definition of

10:33:19 1 obscenity either in the penal code or under Miller vs.
10:33:23 2 California, it captures nonobscene and constitutionally
10:33:28 3 protected speech and that is a significant problem. That
10:33:34 4 is where the overbreadth component is clear.

10:33:38 5 THE COURT: What would be an example of that be?

10:33:43 6 MS. PRATHER: So indecency, right? Under Reno
10:33:47 7 vs. ACLU, the materials were determined to be indecent and
10:33:51 8 not obscene. Obscene has to lack literary or artistic
10:33:56 9 value. So books like Atlas Shrugged, books like Color
10:34:02 10 Purple that have literary and artistic value are not
10:34:05 11 considered obscene. They will be brought within the
10:34:10 12 confines of this statute, Catcher In The Rye, possibly the
10:34:15 13 bible, because literary and artistic value is no
10:34:22 14 consideration nor is taking the work and looking at it as
10:34:25 15 a whole. So that's where you have a huge problem, that
10:34:30 16 sweep of constitutionally protected materials is fatal.

10:34:37 17 Here's a list of books that originally trial
10:34:40 18 courts found to be obscene and then, they were reversed,
10:34:46 19 and they were reversed because of exactly what we just
10:34:50 20 talked about: The books were found to have literary,
10:34:53 21 artistic, political, scientific merit. Books like Catch
10:34:57 22 22, Slaughterhouse-Five, Ulysses, and others. And these
10:35:02 23 are already judicial decisions so you'd have a case --
10:35:10 24 you'd have an incident here where you've got a judicial
10:35:11 25 decision saying these books are not obscene and they would

1 still fall within the definition of sexually relevant or
2 sexually explicit under the Texas statute because it is
3 not tied to the definition of obscenity.

4 Another problem with the law being
5 unconstitutionally overbroad is what we've talked about a
6 little bit, which is the failure to distinguish
7 age-appropriateness. That was a seminal issue in the
8 Fayetteville Public Library case, which is tab 4 in your
9 notebook. The failure to distinguish what a adult or a
10 young adult versus a young child can view means that you
11 are overly broadly restricting access to constitutional
12 work for those young adult readers.

13 This is not a situation where under H.B. 900,
14 there's a distinction instead is a one-size-fits-all
15 model. You rate the books for all K through 12 students
16 regardless of their age, their maturity, that's a problem.
17 A high school senior wouldn't have access to books about
18 teen pregnancy or other things that would actually be very
19 relevant to their lives.

20 I'm not exactly sure what happens with
21 periodicals. I mean, I know West Lake provides
22 subscriptions to the New York Times to all of their
23 students. What if the New York Times has articles about
24 trafficking, about rape, about things that would fall
25 within these definitions? I don't know what happens in

10:36:53 1 that instance. They're not -- I guess not addressed by
10:36:58 2 this because they're a periodical, not a book? But then,
10:37:02 3 the student's still exposed to these same things that the
10:37:05 4 state is trying to keep them from being exposed to. So
10:37:09 5 I'm not sure how it accomplishes their goal.

10:37:11 6 And then, because of the overbreadth issue, we
10:37:15 7 end up having a situation where H.B. 900 violates the
10:37:20 8 constitutional rights of third parties. Those third
10:37:24 9 parties are all booksellers, all publishers, all authors.
10:37:29 10 Because remember these ratings go on a public website for
10:37:34 11 all the world to see and now, all of a sudden, fewer
10:37:39 12 schools feel like they can buy these books. Publishers
10:37:45 13 are harmed in other states, not just in Texas. Students
10:37:49 14 lose their constitutional right to receive information and
10:37:54 15 ideas from their school library. So it's not just the
10:37:57 16 vendors here, the snowball effect is enormous. We do have
10:38:04 17 declarations, as well, that talk about this issue.

10:38:08 18 So I think, your Honor, I've gone over the issues
10:38:10 19 with regard to the standing, the government speech, the
10:38:18 20 nonpublic forum, the different standards that would apply,
10:38:26 21 the fact that this is not commercial speech, and the
10:38:28 22 vagueness, and the overbreadth issue. Is there anything
10:38:32 23 else that you'd like to hear from me on?

10:38:34 24 THE COURT: No.

10:38:35 25 MS. PRATHER: Okay. Our concern here is, the

10:38:38 1 First Amendment embraces the right to distribute
10:38:41 2 literature and it protects the right to receive it. This
10:38:44 3 law violates the Constitution in innumerable ways and we
10:38:48 4 believe it should be enjoined before it takes effect on
10:38:50 5 September 1st. Thank you, your Honor.

10:38:54 6 THE COURT: Does the state wish to respond to
10:38:56 7 anything? Oh, actually, before you sit down, one thing
10:39:01 8 I'd like the plaintiff to focus on in their briefing is
10:39:06 9 anything they wish to amplify with respect to the
10:39:09 10 enforcement issue and its impact on Ex Parte: Young and
10:39:13 11 sovereign immunity.

10:39:16 12 MS. PRATHER: Yes, your Honor.

10:39:39 13 MS. CELLA: Thank you, your Honor.

10:39:44 14 With respect to the issue of the effective date
10:39:47 15 of the bill, plaintiffs keep saying that even though their
10:39:52 16 list is not due until April 1st, they can't sell any books
10:39:57 17 by September -- as of September 1st. But they're parsing
10:40:02 18 out Section 35.002. All of that is in the same section.
10:40:07 19 So insofar as the bill being effective on September 1st,
10:40:11 20 they still don't have any lists due. The state does not
10:40:15 21 read that as meaning they can't sell any books. Nothing
10:40:19 22 -- nothing is going to happen until April 1st. That's the
10:40:23 23 date their lists are due.

10:40:24 24 THE COURT: When you say that -- so let me ask
10:40:27 25 you -- let's go back to the beginning. What is the

10:40:30 1 enforcement mechanism under -- for this statute? I mean,
10:40:36 2 let's just say that the plaintiffs, the publishers don't
10:40:44 3 do any of this. I mean, it comes -- it's September 3rd or
10:40:49 4 it's April 5th. I don't care about -- I'm leaving aside
10:40:51 5 the date now. But they say forget it, we're just going to
10:40:58 6 sell, we're going to ignore the law. Who enforces it?

10:41:04 7 MS. CELLA: Well, I believe it would be...

10:41:06 8 THE COURT: What happens?

10:41:09 9 MS. CELLA: That's a good question. A good
10:41:11 10 question that I don't know that anybody has thought that
10:41:14 11 through yet. I mean, there's no -- in this bill --

10:41:17 12 THE COURT: Don't you think that's important? I
10:41:21 13 mean, when we're talking about, you know -- for example, I
10:41:27 14 keep bringing this -- I mean, Texas, I think got a little
10:41:31 15 bit famous in their -- the bill they passed where they
10:41:35 16 made it difficult for -- I think they essentially made
10:41:40 17 people, citizens to stop women from having abortions
10:41:48 18 because they said a person, a private citizen had a right
10:41:52 19 to turn in a doctor, whatever. I may be misstating that
10:41:55 20 but I'm saying -- my point, I don't care about that bill
10:41:57 21 as much as I care about the whole point was who enforced
10:41:59 22 it. They articulated who enforced it. And so, who
10:42:04 23 enforces this law?

10:42:07 24 MS. CELLA: As far as if they're not -- if they
10:42:10 25 don't give their lists and they're still selling books,

10:42:13 1 let's say.

10:42:13 2 THE COURT: Exactly. Books -- you know, Barnes &
10:42:16 3 Noble or I always hate to say names because I don't care.
10:42:19 4 But Simon & Schuster, Barnes & Noble, BookPeople, whoever,
10:42:23 5 they just say we're going to sell to Austin Independent
10:42:27 6 School District with no -- we're not doing any of this.
10:42:34 7 Who enforces it?

10:42:35 8 MS. CELLA: Well, the restriction is on the
10:42:38 9 school district so they can't purchase from any vendor
10:42:42 10 that doesn't comply, let's say.

10:42:45 11 THE COURT: So --

10:42:46 12 MS. CELLA: As far as who enforces --

10:42:47 13 THE COURT: So you have -- let's say you have
10:42:50 14 Austin Independent School District and they do. They say,
10:42:56 15 well, we have to have books for kids. I mean, it's in
10:43:01 16 that way, I guess, the April thing is an even more
10:43:03 17 interesting date in that school's pretty far along then,
10:43:08 18 they'll have the books. So let me say -- let me try this.

10:43:12 19 You said don't care about -- don't care about
10:43:14 20 September 1st because enforcement doesn't start till
10:43:18 21 April, and so, school's still in in April. Middle of
10:43:26 22 April, these kids have books that are not marked in any
10:43:35 23 way. Who enforces it and what happens?

10:43:38 24 MS. CELLA: Well, I think that would be a policy
10:43:40 25 that TSLAC and board of education would come up with. I

10:43:45 1 agree with you in this bill --

10:43:46 2 THE COURT: Well, that would be nice but you keep
10:43:48 3 saying who knows it will happen. Who knows if that will
10:43:52 4 happen.

10:43:52 5 MS. CELLA: Right. I agree. Who knows if that
10:43:55 6 will happen.

10:43:56 7 THE COURT: So you seem much more sanguine about
10:43:59 8 the fact that there is no specificity on how any of this
10:44:03 9 works than I am. That we don't know who won't enforce it,
10:44:13 10 it seems an issue. We don't know what will happen if
10:44:15 11 people ignore, it seems an issue. You've got books in
10:44:21 12 public school libraries that aren't marked in any way that
10:44:29 13 we don't know how it will be enforced.

10:44:31 14 And what I was going to try and get to is, let's
10:44:34 15 say you have a school district that has a group of school
10:44:43 16 board members. You know, the way I read the news is,
10:44:48 17 there are some school boards that are probably more
10:44:53 18 conservative than others. I'm going to guess there is a
10:44:55 19 school board in one county in Texas that's more
10:44:57 20 conservative than other school boards. The school board
10:45:01 21 in Austin says we don't like this law. We're not going to
10:45:10 22 obey it. What happens?

10:45:12 23 MS. CELLA: So, your Honor, I don't think the
10:45:13 24 question of what happens at the school board or a school
10:45:18 25 purchases books from some vendor that doesn't submit a

10:45:24 1 list has anything to do with the vendors. It actually has
10:45:27 2 to do with the schools because the prohibition is on the
10:45:29 3 schools from buying books from the vendors.

10:45:32 4 THE COURT: Well, what did -- I think one of the
10:45:37 5 issues that has been raised that and I'm going to have to
10:45:41 6 deal with is that there seems to be -- there is an
10:45:47 7 argument of vagueness. And it seems to me that if there
10:45:51 8 is no clear articulation of how this will be enforced and
10:45:57 9 even against whom it will be enforced, that seems like a
10:46:00 10 legitimate issue I oughta be concerned about.

10:46:04 11 MS. CELLA: Well, the prohibition is against
10:46:07 12 school districts purchasing books. So in this case, the
10:46:11 13 school districts are not a party. If you're asking what
10:46:14 14 would be enforced against the plaintiffs, the prohibition
10:46:18 15 is not on the plaintiffs, it's on the school districts.
10:46:21 16 They just can't purchase books from those plaintiffs.

10:46:24 17 THE COURT: Okay. But let's say that they do,
10:46:26 18 what happens?

10:46:26 19 MS. CELLA: I don't think that's an issue before
10:46:29 20 this court because the school districts are not a party
10:46:31 21 but, you know --

10:46:32 22 THE COURT: Well, let's just say I think it is.
10:46:40 23 So what happens? I mean, because the school -- it will
10:46:47 24 have a chilling effect. It might or might not have a
10:46:50 25 chilling effect on a school district's willingness to buy

10:46:53 1 books from a publisher that haven't been marked, depending
10:46:57 2 on what the repercussions are. What are the repercussions?

10:47:01 3 MS. CELLA: Likely, injunctive relief would be
10:47:05 4 the repercussions.

10:47:06 5 THE COURT: Where is that in the statute?

10:47:08 6 MS. CELLA: Well, I mean, if --

10:47:09 7 THE COURT: And who would file it? Who would
10:47:11 8 file for injunctive relief? I hate to pick on Austin
10:47:16 9 School District. We're sitting here. But who would file
10:47:19 10 -- who would have standing to file against Austin
10:47:22 11 Independent School District to enforce this? Is it the
10:47:25 12 state of Texas? Would it be the AG? Would it be the TEA?
10:47:28 13 Would it -- who enforces this?

10:47:32 14 MS. CELLA: Likely, the defendants in this case,
10:47:34 15 the board of education and TSLAC. This bill is --

10:47:39 16 THE COURT: So they have the power to enforce it
10:47:42 17 but they don't have -- but they're not subject to being
10:47:45 18 sued.

10:47:47 19 MS. CELLA: And we see this all the time in state
10:47:51 20 agencies. That's the whole premise of sovereign immunity.

10:47:53 21 And I'd also just like to point out that there is
10:47:56 22 no -- there's no punishment or any sort of enforcement for
10:48:01 23 any initial ratings. So let's just say a list is
10:48:06 24 submitted and every single book is rated no rating or is
10:48:08 25 given no rating. The only if you want to call it a

10:48:14 1 punishment would be if TEA reviews the list --

10:48:18 2 THE COURT: So let me -- I'm sorry to interrupt
10:48:20 3 you. But you actually just hit on what I've really been
10:48:26 4 meaning to ask and thought. So let's say that that's
10:48:29 5 exactly under this statute -- and I actually think this
10:48:33 6 may cut in your favor is why I wanted to ask it.

10:48:37 7 Let's say your argument is, there's no harm here
10:48:40 8 because Ms. Prather's clients can comply with the law by
10:48:47 9 just slapping no rating on a hundred percent of the books
10:48:52 10 and ship them in and now isn't -- what would be illegal
10:48:58 11 under this law if they put no rating on a hundred percent
10:49:03 12 of the books and made TEA go through or someone go through
10:49:07 13 and see if they were wrong? And in fact, you haven't
10:49:11 14 really been able to articulate who would do that, or when
10:49:14 15 they would do it, or if they would do it. In fact, you
10:49:16 16 said there may be no harm because maybe no one would do
10:49:18 17 that.

10:49:19 18 So why shouldn't Ms. Prather just give her
10:49:23 19 clients advice, forget Albright and this federal court.
10:49:27 20 Just slap no labels on everything and let them figure out
10:49:33 21 whether it's sexually explicit or not because even if we
10:49:36 22 take the time to do it, they could overrule us and there's
10:49:41 23 no appeal. So why isn't that your argument to me that
10:49:47 24 they don't have to do anything?

10:49:49 25 MS. CELLA: Well, that's what I was just getting

10:49:51 1 into. There's absolutely no punishment in this bill.

10:49:53 2 THE COURT: So I can write an order that says I'm
10:49:57 3 denying an injunction because you've represented that if
10:50:00 4 the book folks, whoever they are, put no -- I'm saying no
10:50:06 5 labels. No -- what's the --

10:50:08 6 MS. CELLA: Ratings.

10:50:08 7 THE COURT: No rating. No labels is a political
10:50:13 8 party. Just put no ratings on a hundred percent of books,
10:50:16 9 just ship them, have a good day. That seems to be what
10:50:20 10 you're saying: Just ignore it because there's no
10:50:23 11 enforcement. Even if they tried hard and do it, y'all get
10:50:27 12 to overrule them. Why are we -- why are these fine
10:50:32 13 lawyers taking their time to be here? Let's just do that.

10:50:36 14 Could I put that -- I'm denying the injunction
10:50:38 15 because you've represented there's no enforcement of the
10:50:43 16 statute, which doesn't seem to be a very effective
10:50:45 17 statute?

10:50:46 18 MS. CELLA: Well, it's not that there's no
10:50:48 19 enforcement.

10:50:50 20 THE COURT: So who -- okay. Who enforces it?

10:50:56 21 MS. CELLA: So that would likely be board of
10:50:58 22 education and TSLAC. I just am agreeing with you that --

10:51:02 23 THE COURT: Against who? Would they be able to
10:51:04 24 enforce it against these -- the plaintiffs?

10:51:09 25 MS. CELLA: Well, no. The punishment -- I mean,

10:51:11 1 I'm sorry, the school districts would be the parties that
10:51:15 2 are not able to purchase books from -- I mean, you can't
10:51:20 3 force a sale so a plaintiff can't -- a vendor can't go to
10:51:24 4 the school districts and say, I'm making you buy this.
10:51:27 5 So --

10:51:27 6 THE COURT: So if the publishers and the
10:51:35 7 booksellers completely ignore it, there are no
10:51:37 8 repercussions against them.

10:51:38 9 MS. CELLA: I wouldn't say that. I would say
10:51:41 10 there's no punishment, there's no repercussion for their
10:51:44 11 initial rating. The only time that -- I don't know if
10:51:49 12 you'd call it a punishment but if their second -- if TEA
10:51:57 13 reviews a book and they say you need to change this rating
10:52:00 14 and they -- the plaintiffs or the vendors refuse to change
10:52:02 15 that rating --

10:52:03 16 THE COURT: Okay. That's and I'm sure -- and I
10:52:06 17 get that. But why not do that and make you all do the
10:52:10 18 work?

10:52:13 19 MS. CELLA: Well, all I -- I mean, the bill is
10:52:16 20 what it is. They should -- people should be following the
10:52:19 21 bill. But --

10:52:19 22 THE COURT: No, no, no. I'm saying they are
10:52:21 23 following the bill. They say -- they are following the
10:52:27 24 bill. They're labeling it. They're labeling it no
10:52:30 25 rating. They have followed the bill. They have put no

10:52:33 1 rating on a hundred percent of them. They've followed the
10:52:35 2 bill.

10:52:38 3 MS. CELLA: And there would be no punishment for
10:52:39 4 that until -- unless and until they decided.

10:52:43 5 THE COURT: To --

10:52:45 6 MS. CELLA: To ignore a TEA rating change.

10:52:48 7 THE COURT: So I'm just trying to frame so when
10:52:50 8 -- I'm worried about an injunction that the only thing
10:52:54 9 that these folks need to be worried about, what you're
10:52:57 10 saying on behalf of your client is, if down the road, they
10:53:01 11 refuse to comply with a change that was made by the TEA,
10:53:07 12 they put on -- they sell the book -- what was the big book
10:53:13 13 a while back? Brokeback Mountain, wasn't that a book or a
10:53:17 14 movie? It was a book and there was a big controversy at
10:53:22 15 one of the schools here about whether or not it was okay
10:53:25 16 for it to be in there -- for it to be in the library. I
10:53:28 17 think that's the perfect book for this. I never read that
10:53:32 18 book, but I could see where -- I think I know enough about
10:53:39 19 it to see where it might be no rating, it might be
10:53:42 20 sexually explicit, depending on your view of what sexually
10:53:46 21 explicit is.

10:53:49 22 So why don't they just slap no rating on it and
10:53:55 23 if someone -- and you told me, you don't even know if
10:53:57 24 anyone will go back and look at it. But if someone has
10:54:03 25 the energy to do that and we have enough time and money in

10:54:06 1 our state that someone would spend the time looking at
10:54:09 2 books to see if the ratings are correct and they come back
10:54:11 3 and they say no, it's sexually -- Brokeback Mountain is
10:54:17 4 sexually explicit and they tell them they've gotta put
10:54:19 5 that on the book.

10:54:20 6 Now, that's the only fight you're saying that
10:54:22 7 these folks should have is we'll -- would they be willing
10:54:27 8 to comply with the change that's ordered because someone
10:54:32 9 inside the state determines to regulate the speech and
10:54:37 10 that would be government speech, they're regulating it to
10:54:40 11 say this label -- if you're going to put Brokeback
10:54:43 12 Mountain in a public school library, it has to have this
10:54:48 13 label on it so the parents know that the state of Texas
10:54:52 14 thinks it is sexually explicit. The only fear that this
10:54:57 15 company -- these companies have is if they refuse to make
10:55:01 16 that change.

10:55:01 17 MS. CELLA: Which is why the plaintiffs don't
10:55:03 18 have a claim here, yes.

10:55:04 19 THE COURT: And so -- okay. You've said yes.
10:55:06 20 And so, that obviates, for example, their need to go back
10:55:11 21 in your opinion and do all the trouble -- some work Ms.
10:55:15 22 Prather said that her clients might have to do where they
10:55:17 23 have to figure out, well, gosh, we sold thousands of books
10:55:20 24 and do we have to go back through all of them and label
10:55:23 25 them? You're saying that that's not a problem for them.

10:55:26 1 MS. CELLA: Well --

10:55:27 2 THE COURT: Because until the TEA tells them
10:55:32 3 they've gotta change it, they have no problem.

10:55:37 4 MS. CELLA: Yes, your Honor. I can't tell them
10:55:40 5 not to follow the law.

10:55:42 6 THE COURT: Well, but you're saying there are no
10:55:44 7 consequences to not following the law.

10:55:46 8 MS. CELLA: There's no punishment.

10:55:48 9 THE COURT: And let me be more fair to you.
10:55:51 10 There's no punishment for anything they do until they
10:55:57 11 refuse to comply if, and only if, the state tells them
10:56:01 12 they've gotta change their rating on a book and you can't
10:56:05 13 even say that anyone will do that. You don't know if
10:56:08 14 anyone will do that. And if a school won't do it, then
10:56:12 15 you don't even know how that will be enforced. I think
10:56:16 16 that's all -- but I think what I said is all correct,
10:56:22 17 right?

10:56:23 18 MS. CELLA: There is no punishment in the statute
10:56:26 19 for their initial ratings. They should rate the books
10:56:31 20 based on the statute. If in the TEA's view, they get one
10:56:38 21 wrong, then you know where we go from there, the TEA
10:56:41 22 notifies them.

10:56:41 23 THE COURT: Okay.

10:56:42 24 MS. CELLA: As far as the prior books, there's no
10:56:46 25 mechanism for tracing every prior book sold back to

10:56:50 1 whenever.

10:56:52 2 THE COURT: Do they have to do any of them?

10:56:55 3 MS. CELLA: Yes. They need to do what they know.

10:56:57 4 I mean, you -- obviously no one can be made to do

10:57:01 5 something that they don't know. But none of this would

10:57:05 6 fall on the plaintiffs. The plaintiffs need to do their

10:57:07 7 due diligence based on the bill and then, TEA will review

10:57:12 8 their list. That's all this is about -- we're arguing

10:57:14 9 over a list. So TEA has oversight and final say on that

10:57:17 10 list.

10:57:19 11 Once they look at the list prepared by the

10:57:22 12 plaintiffs or any other vendor, they can then determine if

10:57:27 13 there's an incorrect rating or if anything's missing off

10:57:29 14 of that list and, you know, we go from there. But at this

10:57:35 15 initial phase, there is -- I would agree with you that

10:57:37 16 there is no fight. All that the vendors are required to

10:57:41 17 do is submit their list of ratings.

10:57:45 18 THE COURT: Is there anything else you wanted to

10:57:47 19 say?

10:57:48 20 MS. CELLA: About that in particular or in

10:57:50 21 general?

10:57:50 22 THE COURT: Any issue.

10:57:51 23 MS. CELLA: I do want to briefly touch on the

10:57:55 24 vagueness argument.

10:57:56 25 THE COURT: Okay.

10:57:58 1 MS. CELLA: The plaintiffs make a lot of claims
10:58:04 2 about it doesn't provide clear standards because it's made
10:58:08 3 entirely of new definitions. That's not -- that doesn't
10:58:13 4 make a statute vague just because there's a new definition
10:58:16 5 of something. They also claim that --

10:58:20 6 THE COURT: I don't think -- in fairness, I don't
10:58:22 7 think that was really the argument they made. I mean, I'm
10:58:28 8 just telling you, I won't go into it, but I don't think
10:58:29 9 that fairly captures what their argument is. I mean, I
10:58:34 10 think what I heard her say -- and Ms. Prather can correct
10:58:38 11 me, but I think what she said essentially was combination
10:58:43 12 of that the state sort of cobbled together and did a
10:58:46 13 Frankenstein of different, hey, look -- for this, look at
10:58:48 14 this criminal law, for this, look at this criminal law,
10:58:50 15 which private citizens may or may not be able to use that
10:58:55 16 and use it to apply.

10:59:01 17 And second, that in her opinion that it is not
10:59:03 18 sufficiently clear for her clients, book publishers,
10:59:09 19 booksellers, whatever, that the standard should be clear
10:59:12 20 as to what is or isn't sexually explicit if they're
10:59:16 21 required to label it. But given that you've just said
10:59:21 22 there's no liability for mislabeling it, I don't know how
10:59:24 23 compelling that argument is.

10:59:26 24 MS. CELLA: And --

10:59:29 25 THE COURT: Let me ask you this.

10:59:31 1 MS. CELLA: Sure.

10:59:31 2 THE COURT: What standard -- how would the TEA go
10:59:36 3 about going back through and determining whether or not
10:59:40 4 the publishers got it right? What standard -- who would
10:59:43 5 be tasked with that and what standard would that -- how
10:59:47 6 would that be set?

10:59:48 7 MS. CELLA: So as far as the person or a
10:59:51 8 department that would be tasked with that, I'm not sure,
10:59:54 9 but it would be someone at TEA. As far as the standard --

10:59:56 10 THE COURT: Why do you say that? Where does that
10:59:59 11 come from the statute?

11:00:00 12 MS. CELLA: Sure. I will get that for you.
11:00:12 13 That, I believe, is under agency review 35.003 and when it
11:00:19 14 says the agency, in the education code, the agency refers
11:00:22 15 to TEA. So that would be TEA's review. And as what they
11:00:31 16 would determine these ratings based off of is exactly
11:00:33 17 what's in the statute. So I mean, it's defined in the
11:00:35 18 statute.

11:00:36 19 Of course, any sort of balancing test, that
11:00:40 20 doesn't make a statute vague. That happens in law all the
11:00:43 21 time. So in order to rate these -- or review these
11:00:48 22 ratings, TEA would just simply look at the statute and
11:00:52 23 make a determination based on that.

11:00:56 24 And I just also want to touch on plaintiffs made
11:00:59 25 a couple of claims, one of which is that there's nothing

1 in the statute for age appropriateness, but that's not a
2 plaintiff issue. The only thing plaintiff needs to do in
3 this case is to rate books. Anything to do with age
4 appropriateness, or ratings, or if books can be allowed in
5 the library if they're not rated sexually explicit, we
6 know where that falls. That's a school issue and a state
7 issue. That is not the plaintiffs' issue. So the age
8 appropriateness argument would fail in this context.

9 THE COURT: Let me interrupt you just to say, I
10 think your point is well taken and if the plaintiff could
11 also address that in their briefing as to why -- I
12 certainly understand the concerns that are raised and if
13 it were being raised to the legislature about whether or
14 not there should be a difference between whether or not
15 the law -- whether the law should be -- whether the law
16 should be concerned about whether it's for a kindergartner
17 or high school senior, that's one thing.

18 I'd like for the plaintiff to make sure they
19 brief why that is -- that is an issue that impacts you
20 all. And so, I understand your argument and that does
21 seem to go to the standing -- whether they have standing
22 to articulate that -- even if it is deficiency, if they
23 have the right to argue that deficiency.

24 MS. CELLA: And I would just say the same for
25 their claim of inconsistent ratings, that seems to me to

11:02:30 1 be the TEA's issue, not the plaintiffs' issue when they're
11:02:34 2 rating a book.

11:02:35 3 THE COURT: Well, let me say at least off the top
11:02:39 4 of my head, I disagree. I would agree with that if the
11:02:45 5 TEA were the people that were doing the first cut. I
11:02:50 6 think when you're requiring them to do it, I think that
11:02:52 7 issue -- I'm not saying they win or lose, but I'm saying I
11:02:55 8 certainly think they have the right to raise that issue.

11:03:01 9 Is there anything else?

11:03:03 10 MS. CELLA: One second, your Honor. There is one
11:03:06 11 other point I just wanted to mention. I just wanted to
11:03:16 12 bring up as far as the compelled speech, because this is
11:03:24 13 an essential operation of the government -- so we're told
11:03:27 14 in the Fifth Circuit in United States vs. Arnold that
11:03:31 15 there is no right to refrain from speaking when essential
11:03:34 16 operations of government require it for the preservation
11:03:36 17 of an orderly society.

11:03:37 18 And that's exactly what's going on here. We're
11:03:40 19 talking about public school children. We're not just
11:03:42 20 talking about any citizen in the state that may read these
11:03:47 21 books. And because we're talking about public school
11:03:49 22 children and because the state has the right to regulate
11:03:53 23 education in its schools, this is not compelled speech as
11:03:58 24 far as the plaintiffs go. This is just an essential
11:04:00 25 operation of the government.

11:04:02 1 THE COURT: I don't understand that argument.

11:04:06 2 MS. CELLA: So the reason this isn't compelled is
11:04:09 3 because this has to do with an operation of the
11:04:12 4 government. It doesn't have to do with the plaintiff. So
11:04:17 5 the plaintiffs' claim is that they're compelled to speak
11:04:19 6 for the government or they're compelled to speak the
11:04:24 7 government's message.

11:04:24 8 THE COURT: Okay. I understand that.

11:04:25 9 MS. CELLA: So that's where this is an operation
11:04:28 10 of the government so it's not -- it's not the plaintiffs
11:04:31 11 speaking the government's message. It's the government
11:04:34 12 speaking its message.

11:04:36 13 THE COURT: I understand that argument put that
11:04:40 14 way.

11:04:42 15 MS. CELLA: And I believe that's all I have for
11:04:45 16 today, your Honor. Oh, I'm sorry, I did want to bring up
11:04:51 17 one other point and it will be brief. The plaintiffs
11:04:55 18 claim that --

11:04:55 19 THE COURT: I've had three pretrial conferences
11:04:57 20 this week. When you all -- the fact that we're almost
11:05:00 21 done at 11:00 brings me to tears. So I'm very happy to be
11:05:06 22 here.

11:05:09 23 MS. CELLA: The plaintiffs have claimed that this
11:05:11 24 is vague and they're not sure how they would rate books
11:05:13 25 and then, they put up this PowerPoint slide of books that

11:05:16 1 would certainly be banned under the statute. So for them
11:05:20 2 to say that they can't determine how to rate books and
11:05:23 3 then, rate five books just --

11:05:24 4 THE COURT: Well, I don't think that's fair. It
11:05:27 5 wouldn't be fair of me in that I'm sure I could find five
11:05:30 6 books that I -- I could find five books at least I would
11:05:38 7 find sexually explicit that might go in it that people --
11:05:42 8 The Godfather, which my dad let me read it at twelve and
11:05:48 9 he probably shouldn't have. But I probably would under
11:05:51 10 this put that down as sexually explicit. But I think that
11:05:57 11 doesn't follow that there aren't many books where ten
11:06:05 12 people would split five and five about whether they
11:06:07 13 thought they were sexually explicit. I think that was
11:06:10 14 their point and that's the way I took it.

11:06:12 15 I think the fact that there are books they could
11:06:15 16 easily determine are sexually explicit doesn't mean that
11:06:17 17 there aren't books that they wouldn't be able to. So
11:06:20 18 that's what I took from that.

11:06:22 19 MS. CELLA: I understand, your Honor. Just that
11:06:24 20 just doesn't make the statute vague and --

11:06:26 21 THE COURT: Well, I think that's why I'm here.

11:06:30 22 MS. CELLA: Right. Sure. My point is just that
11:06:32 23 they are assigning values to certain books. But that is
11:06:36 24 -- with that point, that's all I have.

11:06:39 25 THE COURT: Ms. Prather, any short followup

11:06:42 1 issues, just rebuttal? I'd like to limit it to rebuttal
11:06:45 2 just out of fairness since I limited them on what they
11:06:54 3 could do. And then, next Monday, you'll be able to bring
11:06:56 4 up any -- you know, whatever you want.

11:06:58 5 MS. PRATHER: Understood, your Honor.

11:06:59 6 Super brief. Love your idea of us just having
11:07:04 7 our clients submit no rating on everything. There still
11:07:10 8 would be costs associated with doing that, trying to find
11:07:13 9 out what all books they sold, for instance. We already
11:07:17 10 talked about the fact that the AG can't bind this court to
11:07:25 11 the fact that they aren't going to enforce something. And
11:07:30 12 that's -- cited case law on that in our reply.

11:07:32 13 But interestingly, if we take that approach and
11:07:36 14 say no rating on everything and submit that by September
11:07:39 15 1st so that we can continue to have school districts
11:07:43 16 purchase books from us, that \$2.6 million fiscal note that
11:07:49 17 the legislative budget board put in for the two additional
11:07:54 18 educational specialists to review all books that were not
11:07:57 19 rated sexually explicit or sexually relevant is going to
11:08:00 20 increase exponentially because then, the burden would be
11:08:05 21 put back on them, which is probably where it should have
11:08:09 22 been to begin with.

11:08:10 23 On your issue of the age appropriateness and that
11:08:15 24 not being an issue for the plaintiff, I think the issue
11:08:17 25 there -- and we can brief this more in the papers that we

11:08:21 1 file next week -- that the issue there is when a reviewer
11:08:28 2 looks at a book, they have to contemplate whether that
11:08:30 3 rating is appropriate for a child between K through 12.
11:08:37 4 And so, the sexually explicit rating for a kindergartner
11:08:42 5 is likely going to be different in many cases than the
11:08:47 6 sexually explicit rating for a twelfth-grader and that's
11:08:51 7 why it does --

11:08:51 8 THE COURT: I'll have to look at that.

11:08:56 9 MS. PRATHER: Impact the vendor.

11:08:56 10 This being not an essential operation -- or this
11:08:59 11 being an essential operation of the government, this is
11:09:02 12 vendors, not the government, being forced to do something.
11:09:07 13 The government can do whatever it wants with regard to
11:09:09 14 keeping books or not keeping books in a library. No
11:09:13 15 problem. The problem is requiring a vendor to do
11:09:16 16 something when the vendor is not the government.

11:09:19 17 And lastly, that you probably already figured
11:09:22 18 this out, those books that we put up as examples were just
11:09:26 19 ones that our team came up with. They're not something
11:09:29 20 that has been formally rated by our clients. Thank you,
11:09:32 21 your Honor.

11:09:40 22 THE COURT: Okeydokey. Thank you all for doing a
11:09:44 23 great job of helping me -- helping educate me. I haven't
11:09:49 24 got to spend a lot of time on these issues and they're
11:09:53 25 certainly very important in every way.

11:09:56 1 I'll plan on getting the plaintiffs' pleadings by
11:10:02 2 a week -- by end of Thursday. We will see you all back
11:10:09 3 here at 9:00 a.m. on Monday morning, a week from this
11:10:14 4 Monday.

11:10:15 5 Is there anything else we need to take up? Yes,
11:10:16 6 ma'am.

11:10:16 7 MS. CELLA: Your Honor, if the -- if we need to
11:10:20 8 reply to plaintiffs' response, what date should we do that
11:10:24 9 by?

11:10:24 10 THE COURT: Well, we're having a hearing on
11:10:25 11 Monday. If you want to get something to us -- whenever
11:10:29 12 you get it to us, you get it to us and if you get it to us
11:10:31 13 in time for us to review it, we'll review it.

11:10:33 14 MS. CELLA: Thank you.

11:10:34 15 THE COURT: Yes, ma'am. Anything else?

11:10:39 16 MS. PRATHER: (Moving head side to side.)

11:10:40 17 THE COURT: Thank y'all for being here.

18 (Proceedings concluded.)

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UNITED STATES DISTRICT COURT)

WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter,
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